33354

JULIUS SALK, HARRY SALK and MAX WARD,

(Plaintiffs) Appellees,

v.

WILLIAM D. SIMMONS,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

255 I.A. 611

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiffs, Julius Salk, Harry Salk and Max Ward, brought their suit in assumpsit against the defendant William D. Simmons, to recover rent for the months of May, June, July, August and September, 1927, at the rate of $90.00 per month. The claim is based on the holding over of the defendant as a tenant under a yearly lease and failure to surrender possession of the premises at its expiration, April 30, 1927. At the close of the evidence the court peremptorily instructed the jury to find the issues in favor of the plaintiffs and against the defendant for $360.00. Judgment was entered upon the verdict, from which an appeal was prayed and allowed to this court.

Defendant by his answer admits holding over after the expiration of the lease, but contends it was under a special arrangement with the Austin Realty Co., acting as agent for the plaintiffs and that, under this arrangement, he was to pay the sum of $3.00 per day while he used and occupied said premises. It is not disputed that the Austin Realty Co. was the agent of the plaintiffs for the purpose of collecting rent under the lease.

Case

Julius Cox, Harry Cox and Wm. Cox,	)
(plaintiffs) appellees,	)
v.	)
Wilbur W. Hinkson,	)
(defendant) appellant.	)

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE DUNN delivered the opinion of the court.

The plaintiffs, Julius Cox, Harry Cox and Wm. Cox, brought their suit in assumpsit against the defendant, Wilbur W. Hinkson, to recover rent for the months of May, June, July, August and September, 1927, at the rate of $[illegible] per month. The claim is based on the building part of the defendant's [illegible] farmer under a yearly lease and failure to surrender possession of the premises at the expiration, April 30, 1927. At the close of the evidence the court peremptorily instructed the jury to find the issues in favor of the plaintiffs and against the defendant for [illegible]. Judgment is entered upon the verdict, from which defendant appeals to the appellate court.

Defendant by his counsel [illegible] the exactitude of the lease, but contends it was [illegible] arrangement with the [illegible] for the plaintiffs and that, under this arrangement, he was to pay the sum of $[illegible] per day while he was [illegible] premises. It is not disputed that the [illegible] and the agent of the plaintiffs for the purpose of [illegible] under the lease.

Counsel for the defendant offered to prove by the defendant that a certain Mr. Warner of the Austin Realty Co. was present at the time the lease was executed and was the person to whom the lease was delivered and that he, the defendant, paid his rent at the office of the Austin Realty Co. and that he told the said Warner that he desired to remain for a few days after the termination of the lease and was informed by Mr. Warner that it would be all right and that he could occupy the premises at so much per day until the defendant had finished the construction of a garage into which he the defendant intended to move his truck as soon as the garage was completed. Simmons testified further that certain signs, stating that the premises were up for rent after the month of April, were placed upon the premises in February, 1927. This offer of proof as made by counsel for the defendant was objected to and the objection was sustained. It is urged for reversal that the court erred in excluding this evidence, on the ground that it was admissible as binding upon the principals, on the theory that the acts of the agent were the acts of the principals.

There was no evidence in the record nor offer of evidence, which tended to show that the principals, the plaintiffs in this cause of action, were apprized of and cognizant of the actions of Warner or the Austin Realty Co. in negotiating an arrangement for the continued occupancy of the premises by the defendant. The agency of the Austin Realty Co. was a limited agency and, so far as the record discloses, was confined to the collection of rents. As agent of the plaintiffs, it had no right to alter, extend or terminate the lease to the premises in question without a direct authorization from the principals. No such authorization having been shown, nor any offer to prove the same, the testimony

Counsel for the defendant offered to prove by the defendant that a certain Mr. Warner of the Austin Realty Co. was present at the time the lease was executed and was the person to whom the lease was delivered and that he, the defendant, paid his rent at the office of the Austin Realty Co. and that he told the said Warner that he desired to remain for a few days after the termination of the lease and was informed by Mr. Warner that it would be all right and that he could occupy the premises at so much per day until the defendant had finished the construction of a garage into which he the defendant intended to carry his truck as soon as the garage was completed. Simmons testified further that [illegible] in August, stating that the premises were up for rent after the month of April, and a [illegible] placed upon the premises in February, 1919. This offer of proof was made by counsel for the defendant and objected to and the objection was sustained. It is urged for reversal that the court erred in excluding this evidence, on the ground that it was admissible as bearing upon the principle, [illegible] that the acts of the agent were [illegible] the principal.

There is no evidence in the record [illegible] which tended to show that the [illegible] [illegible] [illegible], the [illegible] of [illegible] of [illegible] or the Austin Realty Co. [illegible] agent for the continued occupancy of the premises by the defendant. The [illegible] of the Austin Realty Co. was a limited agency only, [illegible] to [illegible], and [illegible] to the collection of rents. So [illegible] the [illegible], it [illegible], extend or [illegible] to the premises [illegible] a [illegible] authorization from the [illegible] having been [illegible], [illegible] [illegible].

was inadmissible and incompetent and the court committed no error in refusing to permit it to go into the record. Under the law, a tenant holding over after the termination of his lease is presumed to be a tenant under the terms of the original lease for the ensuing year. Meyers v. Johnson, 186 Ill. App. 37. The agent has no authority to consent to a change in the terms of the lease. Wieboldt v. Best Brewing Company, 163 Ill. App. 246.

The "For Rent" signs on the premises, according to the testimony, were placed upon the premises in February and the alleged agreement between the agent and the defendant was made in April. We are not impressed with the fact alone, that these signs were on the premises with the knowledge of the plaintiffs. This fact could in no way constitute an affirmation of an agreement between the defendant and the Austin Realty Co. extending the time of the tenancy.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HYNES AND HOLDOM, JJ. CONCUR.

was inadmissible and incompetent and the court committed no error in refusing to permit it to go into the record. Under the law, a tenant holding over after the termination of his lease is presumed to be a tenant under the terms of the original lease for the ensuing year. Marks v. Johnson, 106 Ill. App. 27. The agent has no authority to consent to a change in the terms of the lease. Kimbrell v. Pest Proofing Company, 141 Ill. App. 348.

The "for sale" signs on the premises, according to the testimony, were placed upon the premises in February and the alleged agreement between the agent and the defendant was made in April. We are not impressed with the fact alone, that these signs were on the premises with the knowledge of the plaintiffs. This fact could in no way constitute an affirmation of an agreement between the defendant and the Austin Realty Co. authorizing the sale of the tenancy.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

FRED. E. SULLIVAN, Jr. P.J.

33411

FRED W. NEELY,
(Plaintiff) Appellee,

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, of St. Paul, Minnesota and WM. T. HEINEMANN,

(Defendants)

On Appeal of ST. PAUL AND MARINE INSURANCE COMPANY, of ST. Paul, Minnesota,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 011

Opinion filed November 21, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiff Fred W. Neely, brought his action to recover unearned premiums on a certain policy of insurance, bearing number J-83658, issued by the St. Paul Fire and Marine Insurance Company, defendant. From the facts it appears that the policy of insurance and the premiums amounted to the sum of $181.65. The policy was delivered to the plaintiff by one William T. Heinemann and the premium collected by him. From the facts we gather, it was not paid by Heinemann to the said insurance company.

June 15, 1927, the insurance company, through its general agent, A. F. Shaw & Company, mailed to the plaintiff what purported to be a final notice, saying that if such premium was not paid on or before June 22, 1927, the contract of insurance would be canceled without further notice to the insured. November 27, 1929, suit was brought and the cause tried before the court without a jury, resulting in a finding in favor of the plaintiff and judgment for the sum of $92.53,

38411

FRED T. HENRY,
(Plaintiff) Appellee,

v.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, of St. Paul,
Minnesota and WM. T. McINNERNEY,

(Defendants)

On Appeal of ST. PAUL FIRE AND MARINE
INSURANCE COMPANY, of St. Paul,
Minnesota,

Appellant.

Opinion filed November 21, 1929

MR. JUSTICE DUFFIN WILSON delivered the opinion of the court.

The plaintiff Fred T. Henry, brought his action to recover unearned premiums on a certain policy of insurance, bearing number 1-69886, issued by the St. Paul Fire and Marine Insurance Company, defendant. From the record it appears that the policy of insurance and the premium mentioned to it was of $181.88. The policy was delivered to the plaintiff by one William T. McInnerney the premium collected by him. From the facts as gather, it was not paid by McInnerney to the said insurance company.

June 18, 1927, the insurance company, through its general agent, A. T. Dana & Company, mailed to the plaintiff what purported to be a final notice, stating that if such premium was not paid on or before June 28, 1927, the contract of insurance would be cancelled without further notice to the insured. November 27, 1928, suit was brought and the cause tried before the court without a jury, resulting in a finding in favor of the plaintiff and judgment for the sum of $90.87,

together with costs. It is from that judgment this appeal has been perfected.

It is urged by the defendant that the judgment should be reversed, because there was no evidence on the part of the plaintiff establishing any relationship of agency between Heinemann and the defendant St. Paul Fire and Marine Insurance Company or A. F. Shaw & Company, General Agents. It is also insisted that even though this agency might be shown, never-the-less, the notice of the defendant St. Paul Fire and Marine Insurance Company to the effect that it would cancel the policy was, in fact, not a cancellation, but a mere notice that such would be done in the future. The testimony on behalf of the plaintiff tended to show that the policy was issued by the defendant company, St. Paul Fire and Marine Insurance Company, through its general agent, A. F. Shaw & Company; that the premium was paid to Heinemann who delivered the policy to the plaintiff and received the premium in payment therefor.

The evidence on behalf of the defendant shows that the premium was not received by the defendant or A. F. Shaw & Company, its general agent, but that an account was carried on the books of the A. F. Shaw & Company in the name of W. F. Heinemann and that he had evidently written other insurance through A. F. Shaw & Company upon which he had been credited with commissions. It is insisted by defendant that Heinemann was a street broker and was, in fact, the agent of the plaintiff, but this does not appear to be borne out by the record. The cases cited by defendant relate to instances where a sub-agent has attempted to vary the terms of the policy, but this question is not involved in this proceeding.

together with costs. It is from that judgment that appeal has been perfected.

It is urged by the defendant that the judgment should be reversed, because there was no evidence on the part of the plaintiff establishing any relationship of agency between Robinson and the defendant St. Paul Fire and Marine Insurance Company or A. F. Shaw & Company, general agents. It is also insisted that even though this agency might be shown, nevertheless, the action of the defendant St. Paul Fire and Marine Insurance Company in the effect that it would cancel the policy was, in fact, not a cancellation, but a mere notice that such would be done in the future. The evidency on behalf of the plaintiff tended to show that the policy was issued by the defendant company, St. Paul Fire and Marine Insurance Company, through its general agent, A. F. Shaw & Company; that the premium was paid to defendant the delivered the policy to the plaintiff and received the premium in payment therefor.

The evidence on behalf of the defendant shows that the premium was not received by the defendant or A. F. Shaw & Company, its general agent, but that an account was entered on the books of the A. F. Shaw & Company in the name of . . . Robinson and that he had previously written other insurance through A. F. Shaw & Company upon which he had been credited with commissions. It is insisted by defendant that Robinson was a school teacher and, in fact, [illegible], but this does not appear to be clearly so in the record. The cases cited by defendant relate to instances in which a subagent has authority to vary the terms of the policy, and this question is not involved in this proceeding.

The only question appears to be as to whether or not the insurance company, which has entrusted a policy of insurance to a person for delivery, is bound by his action in accepting the payment of the premium and, consequently, become liable to the insured.

The Supreme Court of this State in the case of Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545, in its opinion says:

> "Under such circumstances, who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon the delivery of the policy is not binding upon the company."

There is no evidence in this case, so far as we are able to ascertain, that Heinemann was acting as the agent of the plaintiff. The fact that he had an account with the general agent of the defendant, and that this account was carried upon their books and that he had procured other insurance through them, rather tended to show that he was, in fact, the agent of the company, acting through their general agents.

It is insisted that the notice of final cancellation was, in fact, a final cancellation of the policy, that therefore, the plaintiff could not recover. The cases cited in support of this contention appear to be based upon facts showing that a loss occurred after such notice and before the policy was, in fact terminated. In the case at bar, however,

The only question appears to be as to whether or not the insurance company, which has entrusted a policy of insurance to a person for delivery, is bound by his action in accepting the payment of the premium and, consequently, become liable to the insured.

The supreme Court of this State in the case of Lawrence Fire Ins. Co. v. Ladd, 80 Ill. 364, in its opinion says:

> "Under such circumstances, who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who alone enabled Fuchsman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still, the company, by placing the policy in the hands of the street broker for delivery, in entrusted from claiming that the payment made to him upon the delivery of the policy is not binding upon the company."

There is no evidence in this case, so far as we are able to ascertain, that Hofmann was acting as the agent of the plaintiff. The fact that he had an account with the general agent of the defendant, and that this account was carried upon their books and that in the ordinary course business through them, rather tended to show that he was, in fact, the agent of the company, acting through their regular agency.

It is unlikely that the notion of final consummation was, in fact, a final consummation of the policy, and therefore, the plaintiff could not recover. The case cited in support of this contention appears to be based upon facts showing that a loss occurred after the delivery of the policy was, in fact terminated. In the case at bar, however,

the policy contained a provision to the effect that the policy might be canceled upon a written request by the insured, the company retaining or collecting the customary short rates for the time it had been in force. The notice of the company dated June 15, 1927, to the assured to the effect that after June 22, 1927, it would cancel the policy if the premium was not paid, without further notice to the assured, was sufficient to authorize the plaintiff to start suit. The starting of the suit was a sufficient notice to the defendant, St. Paul Fire and Marine Insurance Company that the insured intended to terminate the contract. We see no force in this argument advanced by the defendant. Moreover, it is inconsistent with its previous position that there was, in fact, no policy of insurance because of the fact that Heinemann had no authority to consummate a contract between the plaintiff and the defendant, and, therefore, there was no policy of insurance in existence.

The plaintiff having elected to terminate the policy by starting suit November 7, 1927, was entitled to recover the unearned premium from that time until December 31, 1927, at which time the policy terminated by its own terms.

The judgment entered in the cause was for $92.53. The correct amount of the judgment should have been $30.40,- the same being that proportionate share of the premium from November 7, 1927, to December 31, 1927, together with interest.

This cause having been tried by the court without a jury, the judgment of the trial court will be reversed and a proper judgment entered here in favor of the plaintiff

the policy contained a provision to the effect that the policy might be cancelled upon a written request by the insured, the company retaining or collecting the customary short rates for the time it had been in force. The notice of the company dated June 16, 1927, to the assured to the effect that after June 24, 1927, it would cancel the policy if the premium was not paid, without further notice to the assured, was sufficient to authorize the plaintiff to assert suit. The asserting of the suit was a sufficient notice to the insurance, i.e. Fire and Marine Insurance Company that the insured intended to terminate the contract. In the no force in this argument advanced by the defendant. Moreover, it is inconsistent with its previous contention that there was, in fact, no policy of insurance because of the fact that Davenport had no authority to consummate a contract between the plaintiff and the defendant, and, therefore, there was no policy of insurance in existence.

The plaintiff having elected to terminate the policy by operating until November 7, 1927, was entitled to recover the unearned premium from that time until December 23, 1927, as which time the policy terminated by its own terms.

"In judgment entered" in the court was for $[illegible].00. The correct amount of the judgment should have been $[illegible], the same being that paid into the court by the [illegible] from November 7, 1927, to December 23, 1927, together with interest.

"The cause being then tried by the court without a jury, the judgment of the trial court will be reversed and a proper judgment entered here in favor of the plaintiff

for the sum of $39.40.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff for the sum of $39.40, each party to pay its own costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

RYNER AND HOLDOM, JJ. CONCUR.

for the sum of $39.40.

For the reasons stated in this opinion the judgment of the Municipal Court is reversed and judgment is entered here for the plaintiff for the sum of $39.40, which party to pay his own costs.

JUDGMENT MAY BEEN ENTERED ACCORDINGLY.

BYRNS AND DEL GIA, JJ. CONCUR.

33428

CHARLES KRAUSS,
Appellee,
v.
PARAMOUNT CONSTRUCTION COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Charles Krauss, plaintiff brought his action against the defendant, Paramount Construction Company, a corporation, to recover compensation claimed to be earned as commission on contracts for paving procured by him on behalf of the defendant. The jury was waived and the cause submitted to the court, resulting in a finding in favor of the plaintiff in the amount of $1,107.63, on which finding judgment was entered and an appeal prayed and allowed to this court.

Plaintiff's claim is based on an oral contract, under which he was to receive ten per cent commission on all contracts obtained by him. The plaintiff procured four contracts for paving of alleys. The defendant admits plaintiff's ten per cent interest as to the first contract, but insists that the agreement was changed as to the remaining three contracts and that by the change he was to receive all there was above $3.70 per square yard, coming to the defendant. The defendant offered in evidence a statement of its books, prepared by its bookkeeper, which was admitted by the court for the sole and only purpose of showing that a payment of $532.67 had been credited to the plaintiff. Plaintiff insists that it was error on the part of

[illegible]

[illegible] BRAUN,

Appellee,

v.

[illegible] CONSTRUCTION COMPANY, a corporation,

Appellant.

[illegible]

[illegible]

Opinion filed Nov. 5, 1929

[illegible] delivered the opinion of the court.

Obrien Braun, plaintiff brought his action against the defendant, Pittsburgh Construction Company, a corporation, to recover compensation claimed to be owing on a contract for moving houses by him in behalf of the defendant. The jury was waived and the cause submitted to the court, resulting in a finding in favor of the plaintiff in the amount of $1,207.[illegible], on which finding judgment was entered and an appeal prayed and allowed to this court.

Plaintiff's claim is based on an oral contract, which said he was to receive the [illegible] compensation for [illegible] obtained by him. The defendant resisted the claim for payment of [illegible]. The defendant admits plaintiff's [illegible] in the cost interest [illegible] the first [illegible], but insists that the agreement was [illegible] to the [illegible] price [illegible] that by the change [illegible] to [illegible] per square yard, owing to the [illegible]. The [illegible] in evidence [illegible] of the [illegible]. [illegible] by the [illegible], which was adjudged by the court [illegible] in [illegible] showing that [illegible] of [illegible] plaintiff. [illegible] [illegible] [illegible]

the trial court in not permitting the statement to go in for all purposes as bearing out defendant's contention that there had been a change in the contract and that there was nothing due the plaintiff. The books of the defendant company were not offered in evidence by the defendant. A statement was made by counsel for defendant that they were in court, but the proper way to prove them was by their introduction in evidence, if they were competent for any purpose. Welsh v. Shumway, 232 Ill.54.

It is unquestioned that after books of account have been introduced in evidence, where the accounts are complicated and involved, a written statement of the account, prepared by a person qualified for that purpose who has made an examination of the books, may be admitted in evidence if the trial court is of the opinion that it will assist and aid the jury or the court in arriving at its verdict or finding.

We may assume that the court was of the opinion that in the instant case the account was not so involved or complicated as to require such a statement, in which event the books should have been offered in evidence and the question squarely submitted to the trial court as to whether or not they were admissible.

We find no error in the ruling of the court and, for the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, J. J. CONCUR.

The trial court in not permitting the evidence in question for all purposes as contingent information's constituting that [illegible] been a change in the contract [illegible] entirely, for the [illegible] minority. The books of the [illegible] were not [illegible] in evidence by the defendant. [illegible] for defendant that they were [illegible], but the plaintiff may to prove from one of their [illegible] in [illegible], [illegible] [illegible] for [illegible] [illegible] v. [illegible] [illegible].

It is contended that other books of account have been introduced in evidence, [illegible] involved, [illegible] person qualified for such purpose [illegible] of the books, may be admitted in evidence if [illegible] is of the opinion that [illegible] the court in [illegible] [illegible] or [illegible].

We may remark [illegible] the [illegible] in the instant case [illegible] as to require each [illegible], in which case [illegible] have been offered in evidence [illegible] to the trial court as to [illegible] [illegible].

We find no error in the rulings [illegible], for the reasons [illegible] in the opinion. The judgment of the [illegible] court is affirmed.

[illegible]

[illegible].

33437

MRS. WILLIAM ZIMMER,
Appellee,
v.
BERNARD L. VOORHEES,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Mrs. William Zimmer, the plaintiff, filed her suit for rent, based on a certain lease, against Bernard L. Voorhees, the defendant, and the tenant in said instrument. Defendant filed his appearance, together with a jury demand and also filed his affidavit of merits to said cause of action. After said cause was at issue, the plaintiff proceeded to start another action and confessed judgment on the lease in question. Defendant moved to vacate and set aside the judgment entered by confession and to abate said cause because of the pendency of a prior action at law, involving the same parties and the same subject-matter. After a hearing upon the motion, the court ordered the first proceeding to be dismissed and denied the motion of defendand to set aside the judgment by confession and to dismiss the cause because of the pendency of the prior action.

A plea in abatement, setting forth there is a prior action pending involving the same parties and the same subject-matter, unless it comes within one of the exceptions, such as concurrent remedies, is a good plea. The law does not favor numerous suits and where one action will furnish a proper remedy, the bringing of subsequent actions without the dismissal of the prior suit is against the spirit of the law and will be

No. 3247

MRS. WILLIAM ZIMMER,
appellee,

v.

FRANKS L. VOORHEES,
appellant.

APPEAL FROM
municipal court
of DENVER.

Opinion filed Nov. 6, 1929

Mr. PRESIDING JUSTICE HOODE delivered the opinion of the court.

Mrs. William Zimmer, the plaintiff, filed her suit for rent, based on a certain lease, against Franks L. Voorhees, the defendant, and the tenant in said instrument. Defendant filed his appearance, together with a jury demand and also filed his affidavit of merits to avoid entry of judgment. After said cause came to issue, the parties proceeded to enter another motion and conflicting judgments in the issue in question. Defendant moved to vacate and set aside the judgment entered by confession and to quash said cause because of the pendency of a prior action at law, involving the same parties and the same subject-matter. After a hearing upon the motion, the court ordered the first proceeding to be dismissed and denied the motion of defendant to set aside the judgment by confession and to dismiss the cause because of the pendency of the prior action.

A plea in abatement, setting forth facts of a prior action pending involving the same parties and the same subject-matter, unless it comes within one of the exceptions, such as concurrent remedies, is a good plea. The law does not favor numerous suits and where one action will furnish a proper remedy, the bringing of subsequent actions without the dismissal of the prior suit is against the spirit of the law. It will be

abated. It appears to be the rule, however, in this State that a dismissal of the prior action, even after the plea, avoids the abatement of the second suit.

The Supreme Court of this State in the case of Gage v. City of Chicago, 216 Ill. 107, in its opinion said:

> "The court ruled the dismissal of the prior proceeding avoided the objection that a former action was pending, and declined to dismiss this proceeding but proceeded to final judgment, and this is urged as for error. Appellants refer to the ancient rule of common law pleading that a plea of another suit pending, if proven, abates the second action, and counsel for the city cite the later holdings, and what seems to be the current of modern authority, that the dismissal of the prior action, even after the plea, avoids the abatement of the second suit."

While this action was a special assessment proceeding, and it appears that objections were filed to the assessment based on the merits, as well as objection on the ground of a prior suit pending, nevertheless, the language used by the court as to the rule appears to be clear and unambiguous.

The court in the case of Jerseyville Shoe Mfg. Co. v. Bell, 125 Ill. App. 496, in its opinion says:

> "Appellant first contends that the court erred in overruling its demurrer to the first and second replications; that the plea in abatement was good when filed and that appellee could not, after the filing of the plea, dismiss his former suit and then set that fact up by replication in answer to the plea. This subject is one upon which the authorities are not altogether in accord and while the author and compiler of the first edition of the American and English Encyclopedia of Law, vol. 8, page 551, supports the contention of appellant, yet we do not think that such statement there made is in accord with the more modern holding of the courts. In the Encyclopedia of Pleading and Practice, a somewhat more recent work by the same authority, vol. 1, on page 755, the writer says that 'The prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea and thus defeat an abatement,' and in a note on page 756, says: 'According to the later cases, the objection of a former suit pending is removed

abated. It appears to be the rule, however, in this case to that a dismissal of the minor action, or a refer the case, avoids the maintenance of the second suit.

The supreme court of this state in the case of Lego v. City of Spokane, 40 Ill. 197, in its opinion said:

> "The court ruled the dismissal of the first action, overruled the objection that a former action was pending, and declined to dismiss this proceeding but proceeded to final judgment, and this it urged as error. Appellants refer to the ancient rule of common law pleading that a plea of another suit pending, at the writ, bates the second action, and counsel for the city cite the later holdings, and it seems to be the current of modern authority, that the dismissal of the prior action, even after the case, avoids the maintenance of the second suit."

While this action was a special assessment proceeding, and it appears that objections were filed to the assessment roll on the merits, a mere objection on the ground of a prior suit pending, nevertheless, the language seems to the court as to the rule appears to be clear and unmistakable.

The court in the case of Hazelwood v. Chicago City, v. Hall, 158 Ill. App. 490, in its opinion says:

> "Appellant first insists that the suit was filed in violation of the demurrer to the first amended petition; that the order in the case was not when filed and that appellee could not, after the filing of the plea, dismiss the former suit and then set up that by replication in answer to the plea. This object is one upon which the authorities are not alike. The second and which the author and the filing of the first petition of the American and English encyclopedia of law, 8, page 58, supports the contention of appellants, yet we do not think that such is the rule. We are in accord with the more modern doctrine of the law. In the encyclopedia of Pleading and Practice, a treatise on the subject, it is said: "If the action is not tried, and the plaintiff, after the commencement of the second action, dismisses the first action, the second action is barred by the plea of another suit pending." In a note on page 778, author discussing in the case, the objection of a former suit pending is taken,

> by its dismissal or discontinuance, even after plea in abatement in the second suit,' and cites many authorities in support of the more modern rule. There was no error in the action of the court in overruling the demurrer to said replications."

To the same effect see Wright v. Keifer, 131 Ill. App. 298.

Moreover, the affidavit in support of the motion to vacate the judgment appears to be based principally upon the fact that there was another suit pending and did not go to the merits of the action. Such an affidavit must contain facts, in support of the motion to vacate the judgment, which constitute a defense to the action upon the merits. A plea in abatement is purely a dilatory plea, Western Hardware Co. v. Chandler, et al, 211 Ill. App. 513. The sufficiency of the facts, upon which the court acted in denying the motion to vacate the judgment, has not been presented or urged as a ground for reversal in the brief filed in this court. We, therefore, assume that the court rightfully exercised its discretion in refusing to open the judgment, and permit Voorhees the right to come in and defend.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

> by its dismissal or discontinuance, even after plea in abatement in the second suit," and cites many authorities in support of the more modern rule. There was no error in the action of the court in overruling the demurrer to said pleadings."

To the same effect see Kinney v. Miller, 121 Ill. App. 176.

Moreover, the affidavit in support of the motion to vacate the judgment appears to be based principally upon the fact that there was another suit pending and did not go to the merits of the action. Such an affidavit was insufficient in support of the motion to vacate the judgment, which constitutes a defense to the action upon the merits. A plea in abatement is purely a dilatory plea, Freeman Mortgage Co. v. Chandler, et al. 211 Ill. App. 518. The sufficiency of the facts, upon which the court acted in denying the motion to vacate the judgment, has not been questioned or urged as a ground for reversal in the brief filed in this court. We, therefore, assume that the court rightfully exercised its discretion in refusing to open the judgment, and thereby foreclose the right to come in and defend.

For the reasons stated in this opinion, the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

DYER AND HOLDOM, J.J., CONCUR.

33458

STEVE BOLLECK,
Appellee,
v.
SAMUEL VIG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

255 I.A. 612

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Steve Bolleck, the plaintiff, brought his action against Samuel Vig, defendant, for work and labor performed on certain buildings belonging to the defendant, located at Knox, Indiana. The defendant filed his affidavit of merits, charging among other things, that the plaintiff had brought suit on the same claim for the same amount and for the same work in Starke County, Indiana; that the cause was tried before the Circuit Court of that County and resulted in a finding and judgment in favor of the defendant.

The only issue before us is as to whether or not the proof sustained the position of defendant, namely, that the matter was res adjudicata, and therefore, the plaintiff not entitled to recover. To sustain the issues on behalf of the defendant, counsel introduced in evidence a certain record of the proceedings in the case in Starke County, Indiana. This record included a notice of mechanics' lien for work, labor and material furnished at the request of the defendant upon the premises in question, together with a copy of the complaint filed in said cause,. The complaint charges that on the 30th day of May, 1925, the defendant was the owner of the premises in question and entered into a certain written contract, under which the plaintiff agreed to perform the work and labor

33460

STATE, PLAINTIFF,

Appellee,

v.

MANUEL VIG,

Appellant.

} Appeal from

Marion Circuit Court.

} of Indiana.

Opinion filed Nov. 8, 1928

MR. PRESIDING JUSTICE ALBERT delivered the opinion of the court.

Above matter, the plaintiff, brought his action against Manuel Vig, defendant, for work and labor performed on certain buildings belonging to the defendant, located at Knox, Indiana. The defendant filed his affidavit of merits, charging among other things, that the plaintiff had brought suit on the same claim for the same amount and for the same work in Starke County, Indiana; that the cause was tried before the Circuit Court of that county and resulted in a finding and judgment in favor of the defendant.

The only issue before us is as to whether or not the proof sustained the position of defendant, namely, that the matter was res adjudicata, and therefore, the plaintiff not entitled to recover. To sustain the issues in behalf of the defendant, counsel introduced in evidence a certain record of the proceedings in the same Circuit County, Indiana. This record included a notice of mechanic's lien for work, labor and material furnished at the request of the defendant upon the premises in question, together with a copy of the complaint filed in said cause. The complaint showed that on the 20th day of May, 1926, the defendant was the owner of the premises in question and entered into a contract in writing, under which the plaintiff agreed to furnish the work and

in question, for a fixed price. A copy of the contract attached to the complaint appears to be signed by the defendant and the plaintiff, together with two other persons, John Rehor and Steve Dobay. The complaint filed in said cause charged that the said John Rehor and Steve Dobay claim to have some interest in the contract and refuse to join with the plaintiff and are, therefore, made parties defendant. Charges further that said claim, if any, is subsequent to and junior to this claim. The judgment order in said record shows that the cause, being at issue, was submitted to the court without a jury and, the court having heard evidence and being duly advised in the premises, found that the plaintiff took nothing by his complaint and that the defendant recovered costs.

From a reading of the complaint it is apparent that it is for work and labor upon the premises of the defendant; for the same work; for the same amount and for the same period of time. It is insisted, however, on behalf of the plaintiff in the instant case that, while a written contract was entered into, the fact was that the said John Rehor and Steve Dobay, who were to have been associated with the plaintiff in the work, had withdrawn from the contract and that the work and labor was done and material furnished by the plaintiff alone, and that, therefore, the principal case was based upon a novation and not upon the original contract. Further that the record filed for the purpose of showing the prior adjudication, appears to have been tried upon an amended complaint which is not included in the record and that, therefore, the proof as to what was involved in the prior decision is not in evidence. In answer to this it may be said that the judgment order itself, contained in said record, appears to be based upon the complaint and not upon an amended complaint, although the word "insert" in parentheses

in question, for a fixed price. A copy of the contract attached to the complaint appears to be signed by the defendant and the plaintiff, together with two other persons, John Abbot and Steve Doing. The complaint filed in said cause contends that the said John Abbot and Steve Doing claim to have been interested in the contract and refuse to join with the plaintiff and are, therefore, made parties defendant. Charges further that said claim, if any, is subsequent to and junior to this claim. The judgment order in the record shows that the cause, being at issue, was submitted to the court without a jury and, the court having heard evidence and being duly advised in the premises, found that the plaintiff took nothing by its complaint and that the defendant recovered costs.

From a reading of the record it is apparent that it is the work and labor upon the premises of the defendant; for the same work; for the same reason and for the same period of time. It is immaterial, however, on behalf of the plaintiff in the instant case that, while a written contract was entered into, the fact was that the said John Abbot and Steve Doing, who were to have been associated with the plaintiff in the work, had withdrawn from the contract and that the work and labor was done and material furnished by the plaintiff alone, and that, therefore, the principal case was based upon a novation and not upon the original contract. Further that the record filed for the purpose of showing the prior adjudication, appears to have been filed upon an amended complaint which is not included in the record and that, therefore, the proof as to what was involved in the prior decision is not in evidence. In answer to this it may be said that the judgment order itself, contained in said record, appears to be based upon the complaint and not upon an amended complaint, although the word "himself" in second sen

appearing in the record would indicate that an amended complaint had been filed.

On cross-examination the plaintiff admitted that he had started suit in Starke County, Indiana against the defendant; that the contract was the same; that the suit was for the same work and for the same amount as involved in the instant case. This admission, coupled with the record as we find it, is sufficient in our opinion to show that the same issues were involved in the proceedings in Starke County, Indiana as are involved in this proceeding.

While it is true, as a general rule, that the record is the best evidence, nevertheless, the final judgment order in the cause, coupled with the admissions of the plaintiff, are, in our opinion, sufficient to show a prior adjudication between the persons as to the claim in question. While the record indicates the filing of an amended complaint and is silent as to what it contained, it does appear that a general denial was filed by the defendant and the court found the issues in his favor. Under the circumstances, the testimony of the plaintiff on cross-examination was competent.

Herman in his work on Estoppel and Res Judicata, Page 234, Section 211, says:

> "Parol evidence is admissible to show what facts, not inconsistent with the record, were necessarily or actually the basis of the finding, where the record is silent; and in aid of the judgment to identify the parties, as well as to identify the controversy and show that the matters in issue and decided in the first action are the same as those presented for determination in the second."

The position taken by the plaintiff, that the instant case is based upon a novation, is without merit. From the

appearing in the record would indicate that an amended complaint had been filed.

In cross-examination the plaintiff admitted that he had started suit in Bryce County, Indiana against the defendant; that the contract was the same; that the suit was for the same work and for the same amount as involved in the instant case. The admission, coupled with the record as we find it, is sufficient in our opinion to show that the same issues were involved in the proceedings in Bryce County, Indiana as are involved in this proceeding.

While it is true, as a general rule, that the record is the best evidence, nevertheless, the final judgment order in the cause, coupled with the admissions of the plaintiff, are, in our opinion, sufficient to show a prior adjudication between the parties as to the claim in controversy. While the record indicates the filing of an amended complaint and is silent as to what it contained, it does appear that a general denial was filed by the defendant and the court found the issues in his favor. Under the circumstances, the testimony of the plaintiff on cross-examination was competent.

Bates in his work on Pleadings and Practice, page 224, Section 111, says:

> "Prior evidence is admissible to show that facts, not inconsistent with the record, were necessarily or actually the basis of the finding, where the record is silent; and in aid of the judgment to identify the parties, as well as to identify the controversy and show that the matters in issue are decided in the first action are the same as those presented for determination in the second."

The position taken by the plaintiff, that the instant case is based upon a novation, is without merit. For the

evidence it is apparent that the conditions were existent at the time of the starting of the prior action in Starke County, Indiana and the plaintiff saw fit to elect to sue on the written contract, rather than upon the alleged novation.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed and judgment entered here for the defendant.

JUDGMENT REVERSED AND
JUDGMENT HERE.

RYNER AND HOLDOM, JJ. CONCUR.

evidence it is apparent that the conditions were evident at the time of the execution of the prior action in Texas County, Indiana and the plaintiff was free to elect to use on the written contract, rather than upon the alleged conversion.

For the reasons stated in this opinion, the judgment of the municipal court in favor of the defendant and judgment entered for the defendant.

STANLEY STEWART SEC
Judge, Ind.

HIGGS AND HAGGA, JJ. CONCUR.

37351

F.J. BASSETT, Doing business as
F.J. BASSETT & CO.,
Appellant,
v.
FRANK IVES,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

255 I.A. 612

Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

On a trial before the court without the intervention of a jury, by agreement of the parties, there was a finding and judgment in favor of the defendant, and plaintiff appeals.

The action was brought by plaintiff against defendant for a real estate broker's commission claimed to have been earned by plaintiff under a written contract for the exchange of real estate between defendant and one David Posner.

In plaintiff's statement of claim it is charged that plaintiff was a duly licensed real estate broker at Chicago, and that about May 19, 1927, the defendant Ives employed him as a broker to procure for him a purchaser for his property 7042-7048 Michigan Avenue, or in lieu of a purchaser to procure for him an exchange of the aforementioned property; that defendant promised plaintiff to pay commissions as fixed by the Chicago Real Estate Board, if a purchaser or an exchange contract was procured.

Plaintiff alleges that through his efforts a contract was made between defendant Ives and one David Posner for an exchange of properties at a consideration of $150,000; that a written contract to that effect was entered into, copy of which contract was attached as an exhibit and made a part of the

[illegible]

[illegible], doing business as
[illegible], Realty & Co.,

Appellant,

v.

[illegible] IVES,

Appellee.

[illegible]

[illegible]

[illegible]

Opinion filed Nov. 6, 1929

MR. JUSTICE [illegible] delivered the opinion of the court.

On a trial before the court without the intervention of a jury, by agreement of the parties, there was a finding and judgment in favor of the defendant, and plaintiff appeals.

The action was brought by plaintiff against defendant for a real estate broker's commission claimed to have been earned by plaintiff under a written contract for the exchange of real estate between defendant and one [illegible] Hanson.

In plaintiff's statement of claim it is charged that plaintiff was a duly licensed real estate broker in Chicago, and that about May 13, 1927, the defendant [illegible] him as a broker to secure for him a purchaser for his property 7043-7049 Michigan Avenue, or in lieu of a purchaser to secure for him an exchange of the property [illegible] defendant promised plaintiff to pay commissions as [illegible] Chicago real estate board, in payment for the exchange [illegible] was procured.

[illegible] was made between defendant [illegible] exchange of properties at a consideration [illegible] with a contract to that effect [illegible] contract was attached [illegible]

statement of claim; that the regular commission fixed by the Chicago Real Estate Board for negotiating exchange contracts was three per cent of the price of the property, and that in accord therewith plaintiff is entitled to recover the sum of $4500.

The case went to trial upon an amended affidavit of merits, which admitted that plaintiff was a licensed real estate broker and was employed by defendant to procure a purchaser for defendant's property, or in lieu thereof a person ready, willing and able to exchange the property with defendant, and admits that defendant agreed to pay plaintiff the regular real estate broker's commission according to the rules of the Chicago Real Estate Board, and that on the 19th day of May, 1927, defendant entered into a contract of exchange with one David Posner at the request of plaintiff. Defendant then alleged that said David Posner at the time of entering into the contract and at the expiration thereof was unable to comply with its terms, or that he could not supply a good merchantable title to the property due to certain material defects in the title, and was unable to comply with the terms of the agreement through no fault of defendant. Defendant further states that he was at all times ready, able and willing to comply with his part of the agreement and with the terms as set forth in the contract. Defendant denies that plaintiff procured a person ready, able and willing either to purchase defendant's property or to furnish defendant a complete merchantable abstract of title or any other evidence showing that the purchaser had good and sufficient title at the time of the contract or at its expiration, as set forth in plaintiff's exhibit A attached to his statement of claim.

Upon the trial plaintiff introduced the contract of

statements of claim; that the regular commission fixed by the Chicago real estate board for negotiating exchange contracts was three per cent of the price of the property, and that in making otherwise plaintiff is entitled to recover the sum of $4500.

The case came on to trial upon an amended affidavit of merits, which admitted that plaintiff was a licensed real estate broker and was employed by defendant to procure a purchaser for defendant's property, or in lieu thereof a person ready, willing and able to exchange the property with defendant, and claims that defendant agreed to pay plaintiff the regular real estate broker's commission according to the rules of the Chicago Real Estate Board, and that on the 12th day of Dec. 1907, defendant entered into a contract of exchange with one Henry Conner at the request of plaintiff. Defendant then alleged that said Henry Conner at the time of entering into the contract had at the contribution thereof was unable to comply with its terms, or that he could not convey a good and merchantable title to the property due to certain material defects in the title, and was unable to comply with the terms of the agreement through no fault of defendant. Defendant further states that he was at all times ready, able and willing to comply with the part of the agreement and with the terms as set forth in the contract. Defendant denies that plaintiff procured a person ready, able and willing either to purchase defendant's property or to furnish defendant a complete merchantable abstract of title or any other evidence showing that the purchaser had good and marketable title at the time of the contract or at its execution, or set forth in plaintiff's pleadings a statement of claim.

Upon the trial plaintiff introduced the testimony of

exchange between defendant and Posner and then rested his case.

Under the admissions of defendant's second amended affidavit of merits, as above recited, and the introduction by plaintiff in evidence of the contract between defendant and Posner for an exchange of property, executed by defendant and Posner, plaintiff had made a prima facie case, which, without countervailing proof, would entitle him to recover the commission sued for. Lucas v. Schwartz, 343 Ill. App. 418, is an authority in point sustaining the foregoing statement. This court said inter alia in the Lucas case:

> "The trial court held that, it being shown that the defendants had entered into a written contract with Stukis and his wife - the purchasers procured by the plaintiff - a prima facie case was made out in favor of the latter, to the effect that he had procured parties ready, willing and able to make a transaction agreeable to the defendants. In our opinion that ruling was correct."

An attempt was made by defendant to prove by oral evidence that the title to Posner's property covered by the contract was defective. There is no competent evidence in the record to that purport or effect. It is the law that title to real estate can only be proven by documentary evidence. As said in Evans v. Gerry, 174 Ill. 595;

> "A number of attorneys and examiners of real estate titles were offered by appellee to show the title to appellant's property was defective. This was improper. The sufficiency of any title to real estate property is a question of law, and not of fact to be proven by the opinions of witnesses."

In Osborn v. The People, 103 Ill. 224, the court said on this point:

> "Even if the validity of the organization of a corporation could be attacked in a collateral proceeding, the rules of evidence do not permit the proof of the want of title to land by verbal testimony. The title to real

exchange between defendant and Jones and that [illegible] is void.

Under the circumstances of defendant's [illegible] conceded attributes of wealth, as score creditor, and the intoxication on the plaintiff in evidence of the contract between defendant and Jones for an exchange of property, evidenced by [illegible] and deeds, plaintiff has made a prima facie case, which, without countervailing proof, would entitle her to repayment [illegible] sued for. Jones v. Johnson, 4 Ill. App. 64, is an authority in point sustaining the foregoing statements. This court said later also in the Jones case:

> "The trial court held that, in being aware that the defendants had entered into a contract with Estella and his wife - for particulars concerning the illegality - a crime [illegible] was made out in favor of the latter, to the effect that he has [illegible] willing and able to make a transaction appropriate to the circumstances, our opinion that ruling was correct."

An attempt was made by defendants to prove by oral evidence that the title to Jones's property owned by the contract was defective. There is no competent evidence in the record to that purport or effect. It is the law that title to real estate can only be proven by documentary evidence. As held in Allen v. Berry, 174 Ill. 496:

> "A number of attorneys who estimate of real estate titles were offered by appellee to show the title to Kimbrough's property was defective. [illegible] was inconvenient of any title to real estate property is a question of law, and [illegible] to be proven by documentary evidence."

In Osborn v. The Antioch, 108 Ill. 37, [illegible] on that point, [illegible]:

> "Upon the validity of the [illegible] marriage could be [illegible] and [illegible] of attempts to [illegible] title to land by verbal testimony. [illegible]"

estate is required to be in writing, under seal, and all know that the contents of such instruments cannot be proved by verbal testimony unless the original is lost or destroyed. The best evidence must be produced and secondary evidence cannot be admitted unless the best is not attainable. Title, or the absence of title, cannot be proved by verbal testimony so long as there is written evidence. Here there was an attempt to prove the want of title by persons that may be wholly unqualified to determine what constitutes title. In many cases the best land lawyers and most skillful conveyancers are perplexed to determine whether a title is or is not perfect. This illustrates the wisdom of the law in requiring the evidence of title to rest in writing, and all questions as to the validity of the title to be determined by courts when contested, and not by persons unskilled as to what constitutes title. Men would be insecure in their possessions if their title depended on the opinions of their neighbors, whether educated or illiterate. The rules of evidence were violated in this case by admitting the mere opinions of witnesses to prove title in this case."

The foregoing dicta is peculiarly appropriate to the facts in the case at bar. The attempt here was to prove that Posner's title was defective by oral testimony. Such testimony was inadmissible for that purpose. Furthermore the contract provided that if there were any objections made to the title, those objections should be in writing. None such was proffered in this case. We therefore hold that there was no competent evidence showing any defect in Posner's title. Moreover it is admitted by defendant himself that the abstracts of title to the Posner property were in his possession. Therefore, if they showed any defect in the title, it was within his power to produce evidence of such defect from such abstracts. When counsel for plaintiff sought to prove this fact by the cross examination of the defendant, the court erroneously sustained objections made by defendant to such proof, and the court refused further to permit plaintiff to show by cross examination of defendant that no written objections to Posner's title were made. This was likewise error.

> estate is required to be in writing, under seal, and all know that the contents of such instruments cannot be proved by verbal testimony unless the original is lost or destroyed. The best evidence must be produced and secondary evidence cannot be admitted unless the best is not attainable. Title, or the absence of title, cannot be proved by verbal testimony so long as there is written evidence. Here there was an attempt to prove the want of title by persons that may be wholly unqualified to determine what constitutes title. In many cases the best land lawyers and most skillful conveyancers are perplexed to determine whether a title is or is not perfect. This illustrates the wisdom of the law in requiring the evidence of title to rest in writing, and all questions as to the validity of the title to be determined by courts when constituted and not by persons qualified as to what constitutes title. Men would be insecure in their possessions if their title depended upon the opinions of their neighbors, whether educated or illiterate. The rules of evidence were violated in this case by admitting the mere opinions of witnesses to prove title in this case."

The foregoing dicta is peculiarly appropriate to the facts in the case at bar. The attempt here was to prove that Posner's title was defective by oral testimony. Such testimony was inadmissible for that purpose. Furthermore the contract provided that if there were any objections made to the title, those objections should be in writing. None such was returned in this case. We therefore hold that there was no competent evidence showing any defect in Posner's title. Moreover it is admitted by defendant himself that" the abstracts of title to the Posner property were in his possession. Therefore, if they showed any defect in the title, it was within his power to produce evidence of such defect from such abstracts. When counsel for plaintiff sought to prove this fact by the cross examination of the defendant, the court erroneously sustained objections made by defendant to such proof, and the court refused further to permit plaintiff to show by cross examination of defendant that no written objections to Posner's title were made. This was illegal error.

The testimony of Posner was taken at the instance of defendant by deposition. Upon the trial defendant did not avail of Posner's deposition, whereupon plaintiff sought to introduce the same in evidence, but this the court refused to permit for the reason that it was taken at the instance of defendant. Counsel stated what he expected to prove by the deposition, but on objection of defendant the court refused to permit counsel to make any offer of such proof, and would not permit counsel to argue. This ruling was highly prejudicial to plaintiff's case.

In Doggett v. Greene, 254 Ill. 134, the court said:

> "Dr. Greene died before the trial but his deposition has been taken by the defendant. The plaintiffs offered in evidence certain questions and answers contained in the deposition in both the direct and cross-examination, making the witness their own for that purpose. The defendant objected to reading the cross-interrogatories and answers, on the ground that having made Dr. Greene their own witness the plaintiffs were precluded from offering his testimony on cross-examination. In Adams v. Russell, 85 Ill. 384, it was held that where one party takes a deposition which is not withdrawn before the trial and fails or refuses to read it, the other party may introduce it and may read the cross-examination. The court did not err in that ruling."

In Adams v. Russell, 85 Ill. 284, it was said:

> "It is next urged that the court erred in permitting appellees to read the cross-examination to Watson's deposition. We see no objection to such a practice. It has always been understood, that where one party takes a deposition, unless he obtains leave before the trial and withdraws it, if he fails or refuses to read it, the other party may introduce it. All depositions, so long as they are on file in the clerk's office, when properly taken and containing evidence pertinent to the issue, may properly be used as evidence on the trial."

In Acme Waste Paper Co. v. U. S. Paper Supply Co., 233 Ill. 262, it was said:

> "The court held the contrary, citing Adams v. Russell, supra, and observing that where one party takes a deposition which is not withdrawn before the trial fails or refuses to read it, the other party may introduce it and may read the cross-examination.' Other decisions substantially to the same effect are to be

The testimony of Tonner was taken at the instance of defendant by deposition. Upon the trial, counsel for the overall of Tonner's deposition, otherwise similarly counsel to introduce the same in evidence, but this the court refused to permit for the reason that it was taken at the instance of defendant. Counsel might have objected to error on the deposition, but an objection defendant the court prevented to permit counsel to make any offer of such evidence nor could counsel to argue. This ruling was highly prejudicial to plaintiff's case.

In Bennett v. Lemone, 206 Ill. 114, the court said:

"Mr. Lemone died before the trial and his testimony has been taken by the defendant. The plaintiff offered in evidence certain questions and answers contained in the deposition in both the direct and cross-examination, asking the witness their own for that purpose. The defendant objected to admitting the cross-interrogatories and answers, on the ground that having sold in, Lemone their and claiming the plaintiff were precluded from offering his testimony on cross-examination. In Lemon v. Lemon, 82 Ill. 326, it was held that a party taken a deposition and is not satisfied with it, the other may introduce it and by cross-examination, the court did not err in that ruling."

In Lemon v. Lemon, 82 Ill. 326, it was said:

"It is next urged that the court erred in rejecting the questions to be put on the cross-examination in the deposition. We see no objection to such a practice. It has always been understood, that where one party takes a deposition, witness be obtained there before trial, and if he fails or refuses to read it, the other may take and introduce it and by cross-examination. The court did not err in that ruling."

In Lemon v. Lemon, 82 Ill. 326, it was said:

"The court held the contrary, citing Lemon v. Lemon, supra, and observing that where one party takes a deposition which is not satisfactory before the trial, or refuses to read it, the other may introduce it and by cross-examination, elicit testimony substantially to the same effect as the

found in McCormick Harvesting Co. v. Laster, 81 Ill. App. 316; Bartlett v. Slusher, 117 Ill. App. 138, and Gustus v. Murdoch, 154 Ill. App. 270."

The court erroneously admitted in evidence at the instance of defendant and over the objection of plaintiff, a letter dated May 31, 1927, written by plaintiff to David Posner, which is as follows:

> "On the signing of the contract for the purchase of the 32 flat building located at 7042-7044-7046-7048 Michigan Avenue, Chicago, Illinois, it is agreed that this contract is null and void unless a second mortgage is arranged suitable to you."

This letter was written two days after the execution and delivery of the exchange contract between Ives and Posner. Therefore that letter was abortive to change the terms of the written contract, which was under seal. There is no reference to a second mortgage found in the contract between the parties. The contract is under seal and could not be changed by parol. Yackey v. Marion, 269 Ill. 342; Alschuler v. Schiff, 164 ibid. 298; Brettman v. Fischer, 216 ibid. 142.

It appears that one Herbert E. Bradley appeared in the trial court as one of the attorneys for defendant and also represented David Posner. In the preliminary stage of the trial Bradley made a statement to the jury inter alia as follows:

> "I think I will make a short opening statement, and enter my appearance as associate counsel, Herbert E. Bradley, and my office is 120 South LaSalle street, and I shall also be a witness in the case."

It was entirely unethical conduct on the part of Bradley to occupy the dual position of counsel and witness for a party in the same case. This practice has been condemned by our Supreme Court. It was effrontery for Bradley to state that he entered his appearance as attorney and also for the purpose of being a witness for his client. Bradley's testimony is entitled to but little if any credit. By his own action he discredited himself as a witness.

found in *Mohawk Insurance Co.* v. *Lester*, 81 Ill. App. 318; *Burdick* v. *Hubner*, 117 Ill. App. 128, and *Quaine* v. *Bardsley*, 134 Ill. App. 270."

The court erroneously admitted in evidence at the instance of defendants and over the objection of plaintiff, a letter dated May 21, 1937, written by plaintiff to David Cosner, which is as follows:

> "On the signing of the contract for the purchase of the 16 flat building located at 7242-7246-7248 Michigan Avenue, Chicago, Illinois, it is agreed that this contract is null and void unless a second mortgage is arranged suitable to you."

The letter was written two days after the execution and delivery of the exchange contract between Ivan and Cosner. Therefore that letter was adroitly to change the terms of the written contract, which was under seal. There is no reference to a "second mortgage" found in the contract between the parties. The contract is under seal and could not be changed by parol. *Lumber* v. *Nelson*, 299 Ill. 74; *Lindblom* v. *Lahiff*, 164 Ind. 255; *Kreitzman* v. *Liebner*, 40 Ind. App. 1.

It appears that one Anthony A. Bradley testified in the trial court as one of the attorneys for defendant and also represented David Cosner. In the preliminary stage of the trial Bradley made a statement to the jury which was as follows:

> "I think I will make a short opening statement, and enter my appearance as associate counsel, Herbert T. Bradley, and my office is 100 North La Salle Street, and I shall also be a witness in the case."

It was entirely unethical conduct on the part of Bradley to occupy the dual position of counsel and witness for a party in the same case. This practice has been condemned by our Supreme Court. It was efficiency for Bradley to state that he entered his appearance as attorney and also for the purpose of being a witness for his client. Bradley's testimony is entitled to not little if any weight. By his own motion he disqualified himself as a witness.

As there must be a new trial, we refrain from passing upon the weight of the testimony, but for the erroneous rulings of the court in this opinion above indicated, the judgment of the Municipal Court is reversed and the cause is remanded for a new trial consistent with the law as enunciated in this opinion.

REVERSED AND REMANDED.

WILSON, P.J. and RYNER, J. CONCUR.

33383

B. C. ZERNES, doing business as B. C. ZERNES & COMPANY,

Appellant,

v.

EMANUEL J. GOODMAN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

The inception of this action resulted from the entry of a judgment by confession upon the following note:

"$1400 Chicago, Ills. March 5, 1928.
Sixty days after date for value received I promise to pay to the order of B. C. Zernes & Company Fourteen Hundred Dollars at the office of B. C. Zernes & Co. 19 S. LaSalle St., with interest at 6 per cent per annum after maturity until paid. * * **

(Here follows the warrant of attorney to confess judgment.)

(Signed) "Emanuel J. Goodman".

On August 21, 1928, there was a judgment entered by confession against defendant and in favor of plaintiff for the sum of $1538.50, with costs. On motion of defendant, supported by an appropriate affidavit, the judgment was opened and defendant let in to plead. By agreement of the parties the case was submitted for trial before the court without a jury, and resulted in a finding against the plaintiff and the resulting judgment of nil capiat. The record is befofe us for review on the appeal of plaintiff.

Defendant has failed to appear on this appeal. In defendant's affidavit of meritorious defense he states that he was introduced to plaintiff for the purpose of making a loan for

Opinion filed Nov. 6, 1929

Mr. Justice [illegible] delivered the opinion of the court.

The judgment in this action resulted from the entry of a judgment by confession upon the following notes:

"$1400. Chicago, Ill., March 6, 1928.
Sixty days after date for value received I promise to pay to the order of J. T. Ferree Company or order, Fifteen Hundred Dollars (1500) at the office of J. T. Ferree & Co., 10 S. LaSalle St., with interest at 6 per cent per annum after maturity until paid. [illegible]

(Here follows the warrant of attorney to confess judgment.)

(Signed) [illegible] J. Bostwick."

On August 1, 1928, there was judgment entered on confession against defendant and in favor of plaintiff for the sum of $1528.50, with costs. On motion of defendant, supported by an affidavit of merits, the judgment was opened and defendant let in to plead. By agreement of the parties the case was submitted for trial without a jury, and resulted in a finding against the plaintiff and the rendering judgment of nil capiat. The record is entirely for review on the merits of plaintiff.

Defendant was failed to [illegible]. The defendant's affidavit of merits [illegible] was introduced to plaintiff for the purpose of [illegible]

a building to be erected at 6219 - 27 South Kedzie Avenue, Chicago; that plaintiff represented to him that he could make a loan with the Schiff Trust & Savings Bank, but that he could get no commission from the bank and desired that defendant pay him a broker's commission representing that it should come out of the loan; that in order to be certain the commission would be paid he requested defendant to give a note for the amount of the commission, payable in 6o days with provision "that if loan was not obtained at that time that the note would be extended until opening of loan." Defendant further states that the loan has not been opened and the plaintiff in consequence is not entitled to his commission under the note executed, and he further shows in said affidavit that he has discovered since the execution of the note that plaintiff had an agreement with the "bank" whereby he was to receive a commission on the loan from them, and that the representation for the obtaining of said note was therefore false and fraudulent, and that the note was obtained by such false and fraudulent representation, and that therefore there was no consideration, or a total failure of consideration, for the execution and delivery of said note. That affidavit was made on the motion to vacate the judgment by confession and stood as an affidavit of merits in the cause.

It is clear from a reading of the note above set out that no condition is contained in it of any kind that the note shall not be paid when due by its terms. The note is the contract of the parties and cannot be changed in any manner by parol. The note is payable unconditionally and at a time certain and is binding upon the parties to it without any variation.

However, defendant testified on cross examination that he had title to the property on which he authorized plaintiff

a building to be erected at 6010 - 27 South Ashland Avenue, Chicago; that plaintiff represented to him that he would make a loan with the Sanity Trust & Savings Bank, but that he would get no commission from the bank and desired that defendant pay him a broker's commission representing that it would come out of the loan; that in order to be certain the commission would be paid he requested defendant to give a note for the amount of the commission, payable in 60 days with provision "that if loan was not obtained at that time that the note would be extended until opening of loan." Defendant further states that the loan has not been opened and the plaintiff in correspondence is not entitled to his commission under the note executed, and he further alleges in said affidavit that he has discovered since the execution of the note that plaintiff had an agreement with the "bank" whereby he was to receive a commission on the loan from them, and that the representation for the obtaining of said note was therefore false and fraudulent, and that the note was obtained by such false and fraudulent representation, and that therefore there was no consideration, or a total failure of consideration, for the execution and delivery of said note. On a hearing was made on the motion to vacate the judgment by confession and leave to file affidavit of merits in the cause.

It is clear from a reading of the affidavit herein that no condition is contained in it of any kind that the note shall not be paid when due by its terms. Performance is the agreement of the parties and cannot be changed in any manner by trial. The note is payable unconditionally and it - like certain - is binding upon the maker to it without any exception.

However, defendant testified on cross examination that he had title to the property on which is mortgaged plaintiff

to "get" him a loan; that according to a letter date March 5, 1928, addressed to plaintiff he agreed to pay a commission of 7% to them, "I didn't pay anything to Zernes but I gave them a note for the one per cent and that $1400 note represented the one per cent. There isn't any question about that. I was to pay one per cent mentioned in this letter which read as follows: 'Above commission of one per cent is payable to you regardless of any commission which you may receive from your principal.' " Defendant sent plaintiff a letter in which he said:

> "Gentelemen:
> In consideration of One Dollar, receipt of which is hereby acknowledged, and in further consideration of your services in procuring for us a first mortgage loan for the sum of $160,000.00 * * to be secured by our property at 6231 - 6237 South Kedzie Avenue, said loan to be placed according to the terms as provided for in our application to you * * we agree to pay a total commission of seven (7%) per cent. The commission is payable as follows: One (1%) per cent is to be paid direct to B. C. Zernes and Company * * *. The above commission of one (1%) per cent is to be represented by a note payable in 60 days or sooner if we receive the proceeds of the above loan before 60 days from date hereof. The above commission of one (1%) per cent is payable to you regardless of any commission which you may receive from your principal.
> In the event of our failure to pay the above commission, and, should you confess judgment on our note, we hereby agree to waive all rights to contest the judgment for any cause whatsoever, and we hereby further agree to release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment."

That document is signed "Emanuel J. Goodman".

That letter which undisputedly eminates from defendant dissipates entirely the charge that the note was obtained by fraud or without consideration, or that it was to be paid except as in the note specified. Whatever was to become of the remaining 6% of the commission has no effect in any way upon the payment of the note in suit. It is patent from the foregoing letter that the note was to be paid in accord with its terms. According to the letter the time for the payment of the 1% commission was 60

days and under the conditions in the letter stated might be paid sooner. The letter and the note taken together sustain each other and the statement in the letter is confirmatory of the date when the note is payable by its terms. It is patent from defendant's own evidence, de hors the note, that the $1400 being 1% commission due plaintiff, was to be paid at the latest at the time designated in the note, so that the defense of fraud and want of consideration is entirely dissipated by the evidence, oral and documentary, of the defendant himself.

Parol evidence is not admissible to change or alter the terms of the note in suit. Neither can the time of payment be postponed by an agreement restingin parol de hors the terms of the note, and all such evidence admitted on the hearing was so done erroneously. Gt. W. Hat Works v. Pride Hat Co., et al, 224 Ill. App. 248; Huss v. Ford, 197 ibid. 199; Bassett v. Ives, Gen. No. 33351, filed coincidently with this opinion.

It was held in Handley v. Drum, 237 ibid. 587, that under the general rule the party to a written contract may not contradict the terms of that contract by parol. A defendant in an action on a note, unconditional in its terms, could not show by parol, even as against the payee, that the parties had an understanding that the contract was in fact conditional. Hesch v. Dennis, 194 ibid. 663.

We find no evidence legally admissible on behalf of defendant which is sufficient to support the finding of the trial court. The judgment of the Municipal Court is reversed and judgment for the plaintiff entered here for $1538.50, with interest thereon at 5% per annum from August 21, 1928, the date when the judgment was entered for plaintiff by confession in the trial court, amounting in all to the sum of $1625.03.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PLAINTIFF FOR $1625.03.

WILSON, P.J., and RYNER, J. CONCUR.

days and under the conditions in the letter stated might be paid sooner. The letter and the note taken together mention each other and the statement in the letter is contrictory of the date when the note is payable by its terms. It is patent from defendant's own evidence, de novo the s.m, that the $1400 sum is equivalent due "plaintiff", was to be paid at the latest at the time designated in the note, so that the defense of fraud and want of consideration is entirely disproved by the evidence, oral and documentary, of the defendant himself.

Parol evidence is not admissible to change or alter the terms of the note in suit. Neither can the time of payment be postponed by an agreement resting in parol de novo the terms of the note, and all such evidence admitted on the hearing was so done erroneously. Mr. F. Bl. Jones v. Pride Bat Co., et al. 224 Ill. App. 540; Bunn v. Lord, 197 Ill. 132; Bassett v. Lyon, dem. No. 27221, filed coincidentally with this opinion.

It was held in Knudsen v. Ryan, 237 Ill. 487, that under the general rule the party to a written contract may not contradict the terms of that contract by parol. A defendant in an action on a note, unconditional in its terms, could not show by parol, even as against the payee, that the parties had an understanding that the contract was in fact conditional. Bassett v. Lyon, 1.c. Ibid. 540.

We find no evidence legally admissible on behalf of defendant which is sufficient to overcome the finding of the trial court. The judgment of the municipal court is affirmed and judgment for the plaintiff entered here for $1400, with interest thereon at 5% per annum from August 21, 1920, the date when the judgment was entered the plaintiff by consent in the trial court, amounting in all to the sum of $1614.30.

Judgment affirmed and entered.

Gridley, P.J., and Niles, J. concur.

53425

HELEN A. RUSSELL,

Appellant,

v.

BERNARD M. SNOW, Bailiff of the Municipal Court of Chicago, Marine Coal Company, a Corp.,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

12

Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action for the "trial of right of property" in which the plaintiff claimed to own four tons of Pocahontas Mine Run Coal, which the defendant Snow, bailiff, levied upon under a writ of execution of the Municipal Court of Chicago, in a case wherein Marine Coal Company, a corporation, was plaintiff, and Charles J. Russell (the husband and attorney of plaintiff) was defendant. Defendants filed no affidavit of merits or other pleading. The cause was tried before the court without the intervention of a jury, and there was a finding against plaintiff and that the property was rightfully in the hands of Snow, the bailiff. After overruling motions for a new trial and in arrest of judgment, there was a judgment on the finding, and plaintiff brings the record to this court for review.

The defendants have failed to appear and defend this appeal.

The plaintiff was her only witness and she testified that she owned the lease and purchased the furniture on the premises 931-33 Windsor Avenue, Chicago, for the sum of $1400 from Waldemar Carlson in October, 1927; that the lease of the premises was assigned to her by Carlson the same day. The lease

STATES

HERMAN A. HERSKIN,

Appellant,

v.

BERNARD A. ROCK, Judge of the municipal Court of Chicago, Marine Coal Company, a corp.,

Appellee.

) APPEAL FROM

) MUNICIPAL COURT

) OF CHICAGO.

Opinion filed Nov. 6, 1939

MR. JUSTICE MORGAN delivered the opinion of the court.

This is an action for the "trial of right of property" in which the plaintiff claimed to own four tons of Pocahontas Mine Run Coal, which the defendant Rock, bailiff, levied upon under a writ of execution of the Municipal Court of Chicago, in a case wherein Marine Coal Company, a corporation, was plaintiff, and Charles A. Hassell (the husband and attorney of plaintiff) was defendant. Herkand has filed no affidavit of merits or other pleading. The cause was tried before the court without the intervention of a jury, and there was a finding against plaintiff and that the property was rightfully in the hands of Rock, the bailiff. After overruling motions for a new trial and in arrest of judgment, there was judgment on the finding, and plaintiff brings the record to this court for review.

The defendants have filed a brief in support and behalf of appeal.

The plaintiff was her only witness and she testified that she owned the Lease and occupied the premises on the premises 321-23 Indoor Avenue, Chicago, for the sum of $100 from Michaelmas Daisies in December, 19 7; that the lease of the premises was assigned to her by Gideon [illegible]. The lease

and bill of sale were offered and received in evidence without objection. She further testified that her husband, Charles J. Russell, had no interest either in the lease or the furniture, which she used as a rooming house, and while her husband lived and boarded with her he paid $100 a month for his board and room and that she purchased the rooming house lease and furniture with her own money; that she purchased coal from the Clark Coal Company and from the Marine Coal Company; that the coal taken by Snow, the bailiff, was part of the coal which she had purchased from the George Lill Coal Company, and she produced two bills in her own name, which were receipted. These receipted bills were likewise received in evidence. She also testified that she paid for the coal by bank money orders payable to her own order and by her endorsed to the George Lill Coal Company, which orders were offered and received in evidence. She also testified that the money used in the purchase of the rooming house was money she inherited prior to her marriage and which she had invested in a floral business where she had worked subsequent to her marriage, and also money that she had made from investments in chattel mortgages.

To meet the case thus made, defendant put upon the witness stand one Hoskins, the manager of the Marine Coal Company, who testified that he sold coal to Charles J. Russell on two occasions; that a man called him on the phone and stated that he was Charles J. Russell and to deliver six tons of coal to 931-33 Windsor Avenue; that the first order was for six tons and was paid for by the personal check of Chafles J. Russell; that the last six tons were not paid for and that he sued Charles J. Russell for the value of the coal and obtained a judgment against him for the amount due for said six tons of coal.

and bill of sale were offered and received in evidence without objection. She further testified that her husband, Charles G. Russell, had no interest either in the lease or the furniture, which she used as a rooming house, and while her husband lived and boarded with her he paid $100 a month for his board and room and that she purchased the rooming house lease and furniture with her own money; that she purchased coal from the Clark Coal Company and from the Martin Coal Company; that the coal taken by Snow, the bailiff, was part of the coal which she had purchased from the George Gill Coal Company, and she produced two bills in her own name, which were received. These receipts and bills were likewise received in evidence. She also testified that she paid for the coal by bank money orders payable to her own order and by her endorsed to the George Gill Coal Company, which orders were offered and received in evidence. She also testified that the money used in the purchase of the rooming house and money she interested other in her marriage and which she had invested in a flural business where she had worked and earned to her marriage, and also money that she had made from investments in absolut mortgages.

To meet the case thus made, defendant put upon the witness stand one Hoskins, the manager of the Martin Coal Company, who testified that he sold coal to Charles G. Russell by the accountant; that a man called him on the phone and stated that he was Charles G. Russell and to deliver six tons of coal to 3[illegible] Gardner Avenue; that the first order was for six tons and he was paid for by the personal check of Charles G. Russell; that the last six tons were not sold for cash but the [illegible] Russell for the value of the coal and that [illegible] bill for the amount due for said six tons of coal.

The foregoing was all the testimony offered or heard upon the trial of the case.

For sixty years under the statutes of this state women have been emancipated from their common law disabilities as to owning property and conducting business in their own names without the interference of husbands, and in a measure, so far as property rights are concerned, under the statutes of this state, husband and wife are on a parity.

It will be seen from the foregoing testimony of plaintiff, which is not denied by any proof on the part of defendants, or either of them , that plaintiff was operating a rooming house and that the coal levied upon by Bailiff Snow was her property, bought and paid for with her own money, to be used in the operation of a rooming house carried on by her at 931-33 Windsor Avenue, Chicago.

There is nothing in the proofs to discredit the sworn testimony of the plaintiff that the coal levied upon by Bailiff Snow under an execution against her husband was her individual property. There is no testimony that it belonged to any one else. The court had no right to arrive at a conclusion by suspicion, contrary to the sworn proof.

From the foregoing it is patent that the finding and judgment of the Municipal Court is contrary to the law and the evidence. That judgment is therefore reversed and a judgment entered here for plaintiff finding that the right of property in the four tons of Pocahontas coal at the time it was taken by defendant Snow, Bailiff, under an execution against Charles J. Russell, was in the plaintiff.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR PLAINTIFF.

WILSON, P.J., and RYNER, J. CONCUR.

The foregoing was all the testimony offered or heard upon the trial of the case.

For many years under the statutes of this state women have been emancipated from their common law disabilities so as to contract, property and transacting business in their own names without the interference of husband, and in a manner, so far as property rights are concerned, under the laws of this state, husband and wife are on a parity.

It will be seen from the foregoing testimony of plaintiff, which is not contradicted by any proof on the part of defendants, or either of them, that plaintiff was exercising a running business and that the usual legal rights by reliability have her property, bought and sold in her own money, to be used in the operation of a running business carried on by her at 821-23 Flower Avenue, Chicago.

There is nothing in the record to discredit the merits testimony of the plaintiff as to the real income upon by plaintiff from which in execution against her husband was her individual property. There is no testimony that it is claimed to any one else. The court had no right to arrive at a conclusion by speculation, contrary to the merits proof.

From the foregoing it is patent that the finding of judgment of the municipal court is contrary to the law and evidence. The judgment is therefore reversed and entered here for plaintiff in the sum of $[illegible] with interest at the rate of [illegible] per cent per annum from the time it was taken by defendant "non, mutat", under an execution issued upon a judgment against "husband", in the plaintiff.

(Signed) [illegible]
"A. Hon. [illegible]."

[illegible], C.J., and [illegible], concur.

33445

G. W. CRAMER,
Appellee,
v.
WILLIAM D. MURDOCK,
Appellant.

255 I. A. 613

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

In the trial court on the motion of the plaintiff there was an order entered striking defendant's pleas from the record for want of a sufficient affidavit of merits and a judgment rendered as by default in the sum of $1450, and defendant appeals.

The gravamen of the alleged error of the trial court is in holding that the affidavit of merits did not state a meritorious defense.

The difficulty with this case is that the abstract being the pleading of the parties, does not present any matter for review by this court. The abstract is as follows:

*1. Placita
3. Praecipe
5. Declaration
10. Affidavit of claim
12. Summons
14. Pleas and affidavit of merits
16. Order striking pleas for want of sufficient affidavit of merits. Default of defendant entered and judgment for $1450.
Motion defendant to vacate and set aside.

Motion entered and continued to December 8, A. D. 1928.
18. Amended affidavit of merits filed December 8, A. D. 1928.
31. Order continuing motion to vacate judgment to December 15, A. D. 1928.
33. Order denying motion to vacate judgment and order for appeal. Bond $2,500 in thirty days and bill of exceptions in sixty days.

35046

G. W. CHAMBERS,

Appellee,

v.

MELVIN A. MURDOCK,

Appellant.

APPEAL FROM

CIRCUIT COURT,

CLAY COUNTY.

Opinion filed Nov. 6, 1939

MR. JUSTICE DUFFY delivered the opinion of the court.

In the trial court on the motion of the plaintiff there was an order entered striking defendant's plea from the record for want of a sufficient affidavit of merits and a judgment rendered as by default in the sum of $1250, and defendant appeals.

The gravamen of the alleged error of the trial court is in holding that the affidavit of merits did not state a meritorious defense.

The difficulty with this case is that the abstract being the pleading of the merits, does not present any matter for review by this court. The abstract is as follows:

"1. Claim
2. Presentment
3. Declaration
10. Affidavit of claim
11. Summons
14. Plea and affidavit of merits
15. Order striking plea for want of sufficient affidavit of merits. Default of defendant entered and judgment for $1250.
Motion defendant to vacate and set aside.

Motion entered and continued to December 5, . . 1939.
18. Amended affidavit of merits filed November 5, . . 1939.
21. Order continuing motion to vacate judgment to December 15, . 6, 1939.
23. Order denying motion to vacate judgment and order for appeal. Bond $2,500 in lieu of bond and bill of exceptions in sixty days.

25. Appeal bond with the Metropolitan Casualty Insurance Company, New York, as surety filed and approved.
28. Certificate of clerk of Circuit Court."

It will be observed that the foregoing is simply an index to the record. The praecipe does not state the nature of the action. The reference to the declaration is negative, it brings nothing before us, because neither the declaration nor any averment of it is abstracted. Neither has counsel abstracted the affidavit of claim; the summons does not even state the nature of the action. What the pleas and affidavit of merits were the abstract does not show. What was contained in the amended affidavit of merits filed December 8, 1928, does not appear in any form. Nothing regarding the contents of the amended affidavit of merits is abstracted. In this condition of the abstract, nothing is brought to this court for review. The abstract is the pleading of the parties. The court will not go to the record to reverse the judgment, although it will go to it, if necessary, in an effort to affirm the judgment. In this condition of the abstract there is nothing left for this court to do under its rules but to affirm the judgment below. In Chicago Record Herald Co. v. Fred Bender S. F. Co. 207 Ill. 152, this court held in an opinion by Mr. Justice McSurely, that the abstract is the pleading of the parties and must be sufficient to apprise the court of the points which it is claimed necessitate a reversal. The abstract in this case does not apprise the court of anything which occurred in the court below reviewable on this appeal..An abstract which is merely an index, as in the instant case, and does not give any suggestion as to what the action is about, is insufficient.

From the briefs of counsel it does appear that plaintiff's suit was an action to recover rent, and the only point suggested in this appeal is that the trial court erred in holding

25. Appeal bond with the Metropolitan Casualty Insurance Company, New York, as surety filed and approved.
26. Certificate of clerk of Circuit Court."

It will be observed that the foregoing is simply an index to the record. The precipe does not state the nature of the action. The reference to the declaration is negative, it brings nothing before us, because neither the declaration nor any statement of it is abstracted. Neither has counsel abstracted the affidavit of claim; the summons does not even state the nature of the action. That the plea and affidavit of merits were the contract were not shown. That was contained in the amended affidavit of merits filed December 2, 1922, does not appear in any form. Nothing regarding the contents of the amended affidavit of merits is abstracted. In this condition of the abstract, nothing is brought to this court for review. The abstract is the pleading of the parties. The court will not go to the record to review the judgment, although it will go to it, if necessary, in an effort to affirm the judgment. In this condition of the abstract there is nothing left for this court to do under its rules but to affirm the judgment below. In Illinois Record Herald Co. v. Ford Motor C. C. Co. 207 Ill. 18, this court held in an opinion by Mr. Justice Cartwright, that the abstract is the pleading of the parties and must be sufficient to apprise the court of the points upon which it is claimed reversible error occurred. The abstract in this case does not state the nature of anything which occurred in the court below reviewable on this appeal. In abstract which is merely an index, as in the instant case, and does not give any suggestion as to what the action is about, is insufficient.

From the briefs of counsel it does appear that plaintiff's suit was an action to recover rent, and the only point suggested in this appeal is that the trial court erred in holding

that the affidavit of merits was insufficient, and in not giving leave to defendant to file an amended affidavit of merits. As the affidavit of merits is not abstracted in the record we are unable to say whether or not the court erred in holding it insufficient, as not stating a defense. Neither the abstract nor the record show that an amended affidavit of merits was filed by leave of court, the one found in the record being inserted on a motion to vacate the judgment appealed from, which motion the record shows was denied. Nothing relating to the amended affidavit or the motion appears in the abstract. So far as the abstract of the record is concerned, if there ever was a blind case brought to this court, this is that case.

Moreover, as held in Horn v. Neu & Gintz, 63 Ill. 539, in order that the court may review the action of the court below overruling a motion to set aside a default, the motion with the affidavit in support thereof must be preserved in the record by incorporation in the bill of exceptions signed by the judge and properly certified by the clerk. No bill of exceptions is found in the record in this case. People v. Ostrowski, 207 Ill. App.144; Union Bank of Eau Claire v. Milhenning, 246 ibid. 169, in which it was held that a deposition used upon the trial should be included in the bill of exceptions and not in the common law record.

As the abstract of record filed in this appeal is barren of any matter which calls for our review, the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

that the affidavit of merits was insufficient, and in not giving leave to defendant to file an amended affidavit of merits. As the affidavit of merits is not contained in the record we are unable to say whether or not the court erred in holding it insufficient, on not stating a defense. Neither the abstract nor the record show that an amended affidavit of merits was filed by leave of court, the one found in the record being inserted on a motion to vacate the judgment appealed from, which motion the record show was denied. Nothing relating to the amended affidavit or the motion appears in the abstract. So far as the abstract of the record is concerned, if there ever was a bill came brought to this court, this is that case.

Moreover, as held in Bush v. Ken A Bing, 67 Ill. 288, in order that the court may review the action of the court below overruling a motion to set aside a default, the affidavit in the affidavit in set forth what it consists of in the record by incorporation in the bill of exceptions signed by the judge and properly certified by the clerk. No bill of exceptions is found in the record in this case. Lemmie v. Fitzgerald, 37 Ill. App. 164; Union Mfg. Co. of San Diego v. Williamson, 66 Ill. 79. In Bush it was held that a qualification used upon the bill should be included in the bill. If exceptions and are in the record the record

As the abstract of record filed in this appeal is barren of any matter which raise for our review, the judgment of the Circuit Court is affirmed.

Affirmed.

FILSON, J., AND DIETZ, J., DISSENT.

33482

255 I.A. 613

RAE KEIM, Petitioner and Administratrix of the Estate of Joseph Keim, deceased,

Appellant,

v.

J. D. WILLIAMS, et al, Creditors and Claimants in re Estate of Joseph Keim, Deceased,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. JUSTICE HOLDOM delivered the opinion of the court.

In the Probate Court of Cook County the appraisers appointed under the statute to appraise the amount of the widow's award in the estate of Joseph Keim, deceased, appraised the same at the sum of $2500. Rae Keim, the administratrix, presented her account to the Probate Court, in which she took credit for the $2500, widow's award, and for $500 for her commissions as administratrix. On exceptions being filed to said two items, the Probate Court reduced the amount of the widow's award to $1250 and her commissions as administratrix to the sum of $250. There were also exceptions filed to the allowance of attorney's fees, which exceptions were overruled. From the order sustaining such exceptions the administratrix prosecuted an appeal to the Circuit Court. There was a trial on the appeal in the Circuit Court de novo, and the Circuit Court, in effect, affirmed the action of the Probate Court. From this order of the Circuit Court Rae Keim prosecutes this appeal.

It is assigned and argued for error that the Circuit Court erred in concurring in the action of the Probate Court in fixing the amount of the widow's award at $1250 and her commissions at $250, and it is further argued for reversal that the Circuit Court erred in denying Rae Keim a demand for a trial by jury.

20482

MAX KAIN, Petitioner and Administratrix of the Estate of Joseph Kain, deceased,

Appellant,

v.

J. C. WILLIAMS, et al, Creditors and Claimants in re Estate of Joseph Kain, Deceased,

Respondents.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. JUSTICE MORAN delivered the opinion of the court.

In the Probate Court of Cook County the appellant applied under the statute to recover the amount of the widow's award in the estate of Joseph Kain, deceased, equivalent the same at the rate of $1500. Max Kain, the administratrix, presented her account to the Probate Court, in which she took credit for the $1500, widow's award, and for $[illegible] for her commissions as administratrix. Exceptions being filed to said two items, the Probate Court reduced the account of the widow's award to $1250 and her commissions as administratrix to the sum of $250. There were also exceptions filed to the allowance of attorney's fees, which exceptions were overruled. Upon the order sustaining such exceptions the administratrix prosecuted an appeal to the Circuit Court. There was a trial on the issues in the Circuit Court de novo, and the Circuit Court, in effect, affirmed the action of the Probate Court. From this order of the Circuit Court the claimant prosecutes this appeal.

It is assigned and argued for error that the Circuit Court erred in concurring in the action of the Probate Court in fixing the amount of the widow's award at $1500 and her commissions at $250, and it is further argued for reversal that the Circuit Court erred in denying the Kain's demand for a trial by jury.

The salient facts in the case are, that the estate of the deceased Joseph Keim was insolvent, and that the total net assets collected by the administratrix amount to $9300; that at the present time the assets will not pay to exceed forty to forty-five per cent of the amount of claims proven against the estate; that the family expense of the intestate's family for eight years preceding his death was about $3600 a year, and that the family consisted of the deceased and his wife. The poverty of Rae Keim, the widow, is urged upon the court as a reason for reversing the order of the Circuit Court fixing the amount of the widow's award and her commissions as administratrix of her husband's estate in the same amounts as did the Probate Court. Unhappily those considerations cannot be taken cognizance of by the court as against the legal rights and claims of the creditors of her husband's estate.

In denying the widow's motion for a jury trial the court did not commit reversible error. This case is purely a probate matter, controlled by the statutes of this state. Such matters are not cognizable by the course of the common law. Therefore Section 68, Chapter 3, R. S., providing for trial by jury, has no application. In re William Steele, 65 Ill. 322, supports this dicta.

In Doubet et al v. Doubet, 196 Ill. App. 289, the court said:

> "But whether the name of the claim here is advancement or debt, appellant was not entitled to a jury trial. Heward v. Slagle, 53 Ill. 336; Martin v. Martin, 170 Ill. 18; Maynard v. Richards, 166 Ill. 466; Coffey v. Coffey, 179 Ill. 283. It was the duty of the Probate Court in the first instance, and of the Circuit Court on appeal to, without a jury, determine whether there should be a deduction from appellant's distributive share of the estate."

The salient facts in the case are, that the estate of the deceased Joseph Keim was insolvent, and that the total net assets collected by the administratrix amount to $2330; that as the present time the assets will not pay to exceed forty to forty-five per cent of the amount of claims proven against the estate; that the family expenses of the intestate's family for eight years preceding his death was about $2500 a year, and that the family consisted of the deceased and his wife. The poverty of the wife, the widow, is urged upon the court as a reason for reversing the order of the Circuit Court fixing the amount of the widow's award and her commissions as administratrix of her husband's estate in the same manner as did the Probate Court. Unhappily these considerations cannot be taken cognizance of by the court as against the legal rights and claims of the creditors of her husband's estate.

In denying the widow's motion for a jury trial the court did not commit reversible error. This case is merely a probate matter, controlled by the statutes of this state. Such matters are not cognizable by the course of the common law. Therefore Section 56, chapter 3, R. S., providing for trial by jury, has no application. In re William Walsh, 90 Ill. 582, supports this view.

In Hodgen et al v. Hodges, [illegible] Ill. [illegible], 384, the court said:

> "Whether the whole or any part of the plaintiff's claim is a part of the estate or not, is a question for a court and not for a jury. Hammond v. [illegible], 97 Ill. [illegible]; [illegible] v. [illegible], 177 Ill. 151; Seymour v. [illegible], 188 Ill. [illegible]; [illegible] v. Jones, 179 Ill. 580. It was the duty of the Probate Court in the first instance, and of the Circuit Court on appeal to, without a jury, determine whether there should be a deduction from complainant's claim [illegible] of the estate."

In Boyd v. Swallows, 59 ibid. 635, this court said:

> "The court did not err in refusing to submit the question to a jury, for the reasons, first; the hearing was on exceptions to the pleadings as made, which, as a rule, present matters of law and not of fact, second, the proceeding was by way of citation, to compel the administrator to make a proper report and settlement of the estate, wherein the court exercises equitable or discretionary powers. The constitutional provision of a right of trial by jury, Sec. 5, Art. 2, does not apply to or limit the right of courts to exercise such powers. Flaherty v. McCormack, 113 Ill. 538. It does not apply to the exercise of special summary jurisdiction unknown to the common law, and which does not provide for that mode of trial. Ward v. Farwell, 97 Ill. 614. It only secures such right in those tribunals exercising common law jurisdiction, in regard to matters wherein at common law said right existed. Petition of Ferrier, 103 Ill. 367. That right in no event pertains to other proceedings than suits at law. The proceeding is not a suit at law. In re William Steele, 65 Ill. 324."

In appeals from orders of the Probate Court in this state the hearing is de novo. The Circuit Court sits in the same manner as did the Probate Court. In the Probate Court Rae Keim was not entitled to a jury, and on appeal to the Circuit Court she gained no other right than that which the Probate Court possessed, and in denying her demand for a jury the Circuit Court did not err. As said in Trego v. Estate of Cunningham, 267 Ill. 367:

> "It was not intended that a suit begun in one court should be tried by a jury and if begun in another court should be tried by the court alone."

See also Sebree v. Sebree, 293 Ill. 228.

It is provided by Section 76, Chapter 3, R. S. 1927, that the widow's award shall be subject to review by the court if unreasonable and unjust, and that

> "The court may refer the same back to the same appraisers or may appoint other appraisers to fix such widow's award; or, on petition of the widow, the executor or administrator, heir, legatee or devisee, or creditor of the estate, may hear evidence, and upon such hearing may increase or diminish such award as justice may require."

In Ford v. Hallowell, 88 Ibid. 275, this court said:

> "The court did not err in refusing, to submit the question to a jury, for the reasons, first; the bearing was on propositions to the plaintiffs to such, which, as a rule, present matters of law and not of fact, seconds, the presenting one by way of objection, to compel the administrator to make a proper report and settlement of the est ?, thereby the court exercises equitable or discretionary powers. The mental physical prevalence of a right of trial by jury does. ?, ?, does not apply to an limit the right of counts to exercise such powers. Liberty v. Commonwealth, 113 Ill. 556. It does not apply to the exercise of special summary jurisdiction unknown to the common law, and which does not provide for that mode of trial. Ford v. Ferrell, 97 Ill. 614. It only secures such right in those trials in exercising common law jurisdiction, in regard to matters therein at common law said right existed. Petition of Porter, 105 Ill. 507. That right in no event pertains to other proceedings than suits at law. The proceeding is not a suit at law. In re Millice etc 1s, 88 Ill. 324."

In appeals from orders of the Probate Court in this state the hearing is de novo. The circuit court sits in the same manner as did the Probate Court. In the Probate Court the role was not entitled to a jury, and on appeal to the circuit court who gained no other right than that which the Probate court possessed, and in denying her demand for a jury the circuit court did not err. In suit in Times v. Estate of Cunningham, 207 Ill. 227:

> "It was not intended that a suit begun in one county should be tried by a jury and if begun in another county should be tried by the court alone."

See also Pearce v. Parker, 100 Ill. 228.

It is provided by section 26, Chapter 3, s. 1. 1927, that the widow's award shall be subject to review by the court if unreasonable and unjust, and that

> "The court may vacate the same back to the same tribunal or to any special other appointed to fix such ? ? ? ?, or, on petition of the widow, the executor or administrator, heir, legatee or devisee, or creditor of the estate, may hear evidence, and upon such hearing may increase or diminish such award as justice may require."

In reducing the amount of the appraisement of the widow's award the Probate and Circuit Courts acted within their jurisdictions pursuant to power conferred by the statute, supra.

In Section 76, Chapter 3, supra, it is provided that the court in fixing the amount of the widow's award should take into account the condition of the estate being administered. We think under all the circumstances of the case and the insolvency of the estate, the Circuit Court was justified in fixing the amount of the widow's award at the sum of $1250. The rate at which the deceased lived may account for the insolvency of his estate, and the court in the exercise of its judicial discretion had a right, under all the circumstances, to fix the allowance of the widow's award at the sum which it did.

Coming to the action of the Circuit Court in fixing the allowance of the administratrix' commissions at $250, we think such action was fully justified, taking into consideration the fact that her lawyer attended to the collections, and that a creditors' committee assisted in so doing. If the administratrix is entitled to $500, then the allowance to her attorney for fees would in equity and good conscience have to be reduced. The lawyer did the work, the court heard his evidence and concurred in his claim. Under all the circumstances we are not prepared to say that the Circuit Court erred in fixing the amount of her claim for commissions at $250. The allowance of administratrix' fees and of attorney's fees are clearly within the judicial discretion of the trial judge, and we cannot say that in either of the allowances made did the court abuse such discretion.

We find no error in this record warranting a reversal of the order of the Circuit Court appealed from, and it is therefore affirmed.

AFFIRMED.

WILSON, P. J. AND RYNER, J. CONCUR.

In reducing the amount of the supplements of the widow's award the Probate and Circuit Courts acted within their instructions pursuant to power conferred by the statute, supra.

In Section 76, Chapter 3, supra, it is provided that the court in fixing the amount of the widow's award should take into account the condition of the estate being administered. In this under all the circumstances of the case and the insolvency of the estate, the Circuit Court was justified in fixing the amount of the widow's award at the sum of $1200. The rate at which the deceased lived may account for the insolvency of his estate, and the court in the exercise of its judicial discretion and right, under all the circumstances, to fix the allowance of the widow's award at the sum which is $1200.

Coming to the action of the Circuit Court in fixing the allowance of the administrator's commissions at $500, we think such action was fully justified, taking into consideration the fact that her lawyer attended to the collections, and that a small loan committee assisted in so doing. If the administrator is entitled to $500, then the allowance to her attorney for fees would in equity and conscience have to be reduced. The lawyer did the work, the court heard the evidence and concurred in his claim. Under all the circumstances we are not inclined to say that the Circuit Court erred in fixing the amount of her allowance at $500. The allowance of administrator's and attorney's fees is wholly at the judicial discretion of the trial judge, and no cause was shown in either of the allowances made did the court abuse such discretion.

We find no error in this record requiring a reversal of the order of the Circuit Court appealed from, and it is therefore affirmed.

Affirmed.

SILCOX, C. J. and DYER, J. concur.

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PETER PEERBOLTE COMPANY, Inc., a Corporation,

Defendant in Error,

v.

WALTER S. SCHELL, Inc., a Corporation,

Plaintiff in Error.

WRIT OF ERROR TO

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. JUSTICE RYNER delivered the opinion of the court.

Under date of March 20, 1926 the defendant agreed to purchase from the plaintiff 10,000 bushels of Ebenezer or Japanese onion sets, to be shipped "about first half of March, 1927." The order was in writing, signed by both parties, and just above their signatures appeared the following:

> "Shipment is to be made in two-bushel burlap bags unless otherwise instructed sixty days previous to date of shipments. Peter Peerbolte Co. are authorized to use their best judgment in routing shipments unless specific instructions are given at least fifteen days prior to date of shipment.
>
> | | Pounds per Bu. | Price per Bu. |
> |---|---|---|
> | 10,000 Bushels Ebenezers | 32 | 2.75 |
>
> To be shipped F. O. B. Loading Station at Chicago.
> Ship via. Will advise."

In the body of the order appeared the name and address of the purchaser as follows:

> "Name: Walter S. Schell, Inc. P. O. Harrisburg, County.
> State: Penna. Ship to same."

The onion sets were to be grown and harvested during the season of 1926 by farmers with whom the plaintiff had contracts of purchase. The season for selling at retail and planting of onion sets is of short duration. It usually commences in March and ends sometime in the month of May of each year.

Opinion filed Nov. 6, 1939

Mr. JUSTICE [illegible] delivered the opinion of the court.

Under date of March 30, 1936 the defendant [illegible] to purchase from the plaintiff 10,000 [illegible] or thereabouts and/or more, to be shipped "about first half of March, 1937." The order was in writing, signed by [illegible], and just above their signatures appeared the following.

"Statement is to be made in two-pound bales [illegible] bales otherwise increased slightly due to previous [illegible] of tolerance. Later Texas is to, are authorized to use their own judgment in rounding statements unless specific instructions are given at least fifteen days prior to date of shipment.

[illegible]

In the body of the order appeared the name and address of the purchaser as follows:

"Name: [illegible] Cotton, Inc., [illegible]
State: [illegible]"

The order was [illegible]

the season of 1936 by Texas [illegible] of [illegible] of warehouse. The [illegible] of [illegible] cotton was in short [illegible] and this [illegible] in the [illegible].

The defendant accepted and paid for 1986 bushels of onion sets out of the entire amount contracted for. From early in March until the latter part of April 1927, a number of letters and telegrams, relating to the delivery of the balance, passed between the parties. These documents clearly disclose that when the time for delivery arrived, the defendant had serious doubts about its ability to dispose of the sets ordered or to perform its contract. Under date of March 2, 1927 it wrote the plaintiff as follows:

"Peter Peerbolte Company,
South Holland, Illinois.
Gentlemen:

We have just received a very unexpected and very severe blow. Our Mr. Smith who has been calling on our customers in New York State has been compelled to resign his position because of his health especially and other personal reasons.

Because of the very unfavorable season the growers had in New York State last year they withheld ordering and our Mr. Smith expected to sell them the usual quantity about this time for they all claimed that they would not order until nearer planting time. Now we find ourselves without orders for these sets and without a salesman to sell them for us * * *. We are going to make an effort to send our Mr. Ray V. Smith, who called on you, to New York State to solicit these customers, but we have no idea as to how it will work out.

Under these circumstances I am writing you this special letter to ask you to do anything in your power to relieve us of as many sets as possible and sell them elsewhere if you can, otherwise we would be facing a terrific loss, having no where to sell these sets except in this section where we have been selling them and if Mr. Smith is not successful in moving them we do not know what we will do. We will make every effort to dispose of all of them we can or as many as possible * * *.

Please treat this matter confidential.

Yours very truly
Walter S. Schell."

On March 7, 1927, the plaintiff replied by letter which was, in part, as follows:

"We are unable to help you out of this predicament as we have held this lot of sets in stock for you all this time and the way it now looks we will be unable to dispose of any more of these onion sets as most of the trade is supplied on this variety at the present late date. We will therefore have to look forward for shipping instructions on your contract sets.

Thanking you for past favors and regretting our

The defendant accepted and said for 1928 bushels of onion sets out of the entire amount contracted for. From early in March until the latter part of April 1927, a number of letters and telegrams, relating to the delivery of the onions, passed between the parties. These documents clearly disclose that when the time for delivery arrived, the defendant had serious doubts about its ability to dispose of the sets ordered or to perform its contract. Under date of March 4, 1927 it wrote the plaintiff as follows:

"Peter Pomphlet to Company,
South Holland, Illinois.
Gentlemen:

We have just received a very unexpected and very severe blow. Our Mr. Smith who has been selling on our customers in New York State has been compelled to resign his position because of his health especially and other personal reasons.

Because of the very unfavorable season the growers had in New York State last year they withheld ordering and our Mr. Smith expected to sell them the usual quantity about this time for they all claimed that they would not order until nearer planting time. Now we find ourselves without orders for these sets and without a salesman to sell them for us " " . We are going to make an effort to send our Mr. Jay F. Smith, who called on you, to New York State to solicit these customers, but we have no idea as to how it will work out.

Under these circumstances I am writing you this special letter to ask you to do anything in your power to relieve us of as many sets as possible and tell them elsewhere if you can, otherwise we would be totally crippled loser, having no where to sell these sets except in this section where we have been selling them for Mr. Smith is not successful in moving them we do not know what we will do. We will make every effort to dispose of all of them we can or as many as possible " " .

Please treat this matter confidential.

Yours very truly

Walter S. Shell."

On March 5, 1927, the plaintiff replied by letter which was, in part, as follows:

"We are unable to help you out in this emergency. As we have held this lot of sets in stock for you all this time and the way it now looks we will be unable to dispose of any more of these onion sets as most of the trade is supplied on this variety at the present late date. We will therefore have to look forward for old style instructions on your contract sets.

Thanking you for past favors and regretting our

inability to help you out, we beg to remain,
Yours very truly,
Peter Peerbolte Co., Inc."

On March 16, March 22, March 23 and March 29, 1927, the plaintiff by letter or telegram demanded shipping instructions, warned the defendant that the time for shipment had arrived and that the defendant would be held responsible for all loss due to shrinkage or difference between the contract and market price, in the event of a resale. In several of its replies the defendant acknowledged its inability to dispose of the onion sets and asked the plaintiff to sell them at the best possible price.

Finally, in a second communication, on March 29, 1927, the plaintiff advised the defendant as follows:

"We are herewith enclosing confirmation of wire sent you today and wish to state that we are holding your sets, which we have milled, weighed up, and put back crates for your instructions. We will try hard to sell these sets if we have your instructions to do so, but we will expect you to stand in back of us should we be unable to dispose of same and also stand the difference between resale and the contract price of $2.75 per bushel or $3,00 per bushel if we sell them 7/8 inch.
"We trust you can see our position and that you will wire us sometime tomorrow just what you wish us to do with these sets. Thanking you in advance for same, we beg to remain,
Very truly yours,
Peter Peerbolte, Pres.
Peter Peerbolte Co., Inc."

On the same day the defendant replied by telegram which read:

"Answering wire this authorizes you to sell all our contract sets and charge to us loss if any. We have never yet broken a contract with any one and certainly will not with you. Our Mr. Smith will be to see you Mondyy."

According to the testimony of the plaintiff's witnesses no part of the 8014 bushels of sets remaining to be delivered under the contract was ever disposed of. The sets being of a perishable nature rotted and became wholly without value.

Inability to help you out, we beg to remain,
Yours very truly,
Peter Pearsolite Co., Inc.

On March 16, March 24, March 25 and March 28, 1927, the plaintiff by letter or telegram demanded shipping instructions, warned the defendant that the time for shipment had arrived and that the defendant would be held responsible for all loss due to slackness or difference between the contract and market price, in the event of a resale. In answer of its replies the defendant acknowledged its inability to dispose of the onion seed and asked the plaintiff to sell them at the best possible price.

Finally, in a second communication, on March 28, 1927, the plaintiff advised the defendant as follows:

"We are herewith enclosing confirmation of sale sent you today and wish to state that we are holding your note, which is here willed, weighed up, and put back onions for your instructions. We will try hard to sell these onions if we have your instructions to do so, but we will expect you to stand in back of us should we be unable to dispose of same and also stand the difference between remain and the contract price of $2.75 per bushel on 1,000 our bushelit we sell them 7/8 lbs.
"We trust you can see our position and that you will give us positive instructions just what you wish us to do with these seeds. Thanking you in advance for same, we beg to remain,

Very truly yours,
Peter Pearsolite, Jrs.
Peter Pearsolite Co., Inc."

On the same day the defendant replied by telegram which read:

"Answering wire will endeavor you to sell all our contract seeds and charge to in loss if any. We have never yet broken a contract with any one and certainly will not with you. Our Mr. Smith will be in see you Monday."

According to the testimony of the plaintiff's witnesses no part of the 8014 bushels of seed remaining to be delivered under the contract was ever disposed of. The seed being of a perishable nature rotted and became wholly without value.

In the latter part of May, 1927 the parties opened negotiations to adjust their differences. A representative of the defendant testified that the president of the plaintiff orally agreed to accept 5,000 pounds of onion seeds in full satisfaction of the plaintiff's claim for damages. The president of the plaintiff testified that he demanded the payment of $5,000.00 cash in addition and that no definite agreement was arrived at.

The real understanding, or perhaps it might better be termed misunderstanding, of the parties is, however reflected in the letters and telegrams exchanged between them. On May 31, 1927 the plaintiff telegraphed the defendant as follows:

> "Find we can use seed up to 5,000 pounds J. P. Red and Yellow grown by Morse Send by freight to Lansing via Penna Railroad immediately stop will credit your account with same at One Dollar per pound Answer
>
> Peter Peerbolte Co. Inc."

On June 2, 1927, the defendant replied by telegram that

> "We are shipping onion seed today as instructed.
> Walter S. Schell, Inc."

This telegram was confirmed by a letter two days later in which the defendant said:

> "This seed must be accepted with the understanding that this represents the full amount of allowance that we will make on our contract with you for onion sets."

and also

> "It is our sincere opinion that we are acting most liberally with you in offering to furnish this seed to you under these circumstances."

Then followed a letter from the plaintiff dated June 11, 1927, stating:

> "The shipment of seed arrived this morning. We are accepting the seed as per our wire and your confirmation of same of which we are enclosing copies. We certainly are suprised at the attitude you take in the matter as per your letter of June 4 * * *. We have always been fair with you people and we want to be fair now, therefore we

In the latter part of May, 1927 the parties ceased negotiations to adjust their differences. A representative of the defendant testified that the creditors of the plaintiff orally agreed to accept 5,000 pounds of onions early in full satisfaction of the plaintiff's claim for damages. The president of the plaintiff testified that he demanded the payment of $5,000.00 cash in addition and that no definite agreement was arrived at.

The real understanding, or perhaps it might better be termed misunderstanding, of the parties is, however reflected in the letters and telegrams exchanged between them. On May 31, 1927 the plaintiff telegraphed the defendant as follows:

> "If we can use seed up to 5,000 pounds f. o. dgd and follow prices by horse deal by freight to Dunning via Kansas Pacific Transitory stop will credit your account with same at the dollar. Wire yes or no answer."

Later received is, inc.

On June 4, 1927, the defendant replied by telegram that

> "We are shipping Union seed Dunny is instructed. Ballot is Dodge, Ida."

This telegram was confirmed by a letter two days later in which the defendant said:

> "Dear Sir: Your wire will be accepted with the understanding that this represents the full amount of allowance that we will make on our contract with you for onion seed."

and also

> "It is our firmest opinion that we have acted in liberality with you in offering to furnish this seed to you under these circumstances."

Then followed a letter from the plaintiff dated June 11, 1927, stating:

> "The shipment of seed arrived this morning. We are accepting the seed in our store at Dunning. Confirmation of some of which we are enclosing copies. We certainly are surprised at the attitude you take in the matter as per your letter of June 4th. We have always been fair with you people and we want to be fair now, therefore we

make the following proposition: We take the onion seed which is worth $5,000 and you mail us two checks for $2500 each one dated July 1st and one dated August 1st. We think we are going the limit in making this offer and we are taking enormous losses. This is absolutely the best we are going to do. Please let us know at once whether or not you accept this proposition. If not we will have to take legal action. However, we trust this will not be necessary as we do not like to take this action."

On June 14, 1927 the defendant replied by letter, in part, as follows:

"You are asking us to do certain things without ever having given us any statement showing any loss whatever. To arrive at a definite settlement we should have had before we shipped you this seed, a complete list of all your sales showing the amount you realized on every shipment covering the sets which you advised us you had reserved for us in your Wisconsin warehouse and which sets were all sold " " ". As stated in our previous letter, if you are not willing to accept this seed in full settlement of our controversy then please return it."

The 5,000 pounds of onion seeds arrived at Lansing, Illinois on June 11, 1927. On June 17, 1927 the plaintiff instituted suit in assumpsit in the Superior Court of Cook County against the defendant. On the following day a writ of attachment in aid was issued by virtue of which, on June 20, 1927, a levy was made upon the 5,000 pounds of onion seeds. A jury trial was had, resulting in a verdict in favor of the defendant on the issues raised by the attachment in aid and a verdict for the plaintiff on the assumpsit issues. Judgment was entered on each verdict. The plaintiff was granted an appeal but did not perfect it. This is the appeal of the defendant from the judgment entered in the assumpsit proceeding.

The first point urged as a ground for reversal of the judgment of the trial court is that the plaintiff was not entitled to recover the contract price because the title to the onion sets had not passed. This argument is based upon the contention that the goods being unascertained at the time of

make the following proposition: We have the union agreement which is worth $5,000 and you will be two checks for $2500 each one dated July 1st and one dated August 1st. We think we are going the limit in making this offer and we are making enormous losses. This is exactly the best we are going to do. Please let us know at once whether or not you accept this proposition. If not we will have to take legal action. However, we think this will not be necessary as we do not like to take this action."

On June 14, 1927 the defendant replied by letter, in part, as follows:

"You are asking us to do certain things without your having given us any statement showing any loss whatever. In arriving at a certain settlement we should love had before us signed you this week, a complete list of all your sales showing the amount you realized on every equipment covering the sums which you advised us you had received for us in your financial statements and which sums were all sold " " ". As stated in our previous letter, if you are not willing to accept this week in full settlement of our counterproposal then please return it."

The $,500 upon the union weeds arrived at terminal.

Filed on June 1., 1927. On June 17, 1927 the plaintiff instituted suit in assumpsit in the superior court of Cook County against the defendant. On the following day a writ of attachment in aid was issued by virtue of which, on June 20, 1927, a levy was made upon the $,500 pounds of union weeds. A jury trial was had, resulting in a verdict in favor of the defendant on the issue raised by the attachment in aid and a verdict for the plaintiff on the assumpsit issue. Judgment was entered on each verdict. The plaintiff was granted a new trial but not on the ground. This is the appeal of the defendant from the judgment entered in the assumpsit proceeding.

The first point urged on a motion for reversal of the judgment of the trial court is that the plaintiff is not entitled to recover the contract price because the title to the onions were not passed. This argument is based upon the contention that the goods being delivered at the time [illegible]

the making of the contract, the evidence failed to establish an appropriation of the goods to the contract, within the meaning of the Uniform Sales Act of this state. But there was evidence tending to show an appropriation of 6,500 bushels of sets which presented an issue of fact for the determination of the jury. The amount of the verdict shows that the jury found an appropriation to this extent. In addition to this, a setting aside of the entire amount to be delivered would have availed nothing. Before the time for delivery arrived the defendant was entreating the plaintiff to do all in the plaintiff's power to relieve the defendant from the obligations of a burdensome contract. It was unable to sell any of the onion sets. It wanted no further deliveries and requested none. Finally, it authorized the plaintiff "to sell all our contract sets and charge to us loss, if any".

In connection with the same point it is contended that while the court erred in admitting in evidence the correspondence between the parties, the letters and telegrams show "that the parties thereby practically entered into a contract that the plaintiff should undertake to resell the onion sets at the best price obtainable and hold the defendant only for the damages resulting by way of loss from such resale."

The latter contention appears to be sound in fact and law. There is nothing in the Uniform Sales Act prohibitive of such an arrangement. This being true, the only issue of substance presented by the record is whether the plaintiff fulfilled its undertaking to try to sell the sets. The plaintiff's proposition of March 29, 1927, was that it would "try hard" to sell them but that it would hold the defendant liable for the difference between the resale and the contract price. On the

the making of the contract, the evidence failed to establish an appropriation of the goods to the contract, within the meaning of the Uniform Sales Act of this state. But there was evidence tending to show an appropriation of 8,000 bushels of oats which occasioned an issue of fact for the determination of the jury. The amount of the verdict shows that the jury found an appropriation to this extent. In addition to this, a nothing value of the entire amount to be delivered could have arrived nothing. Before the time for delivery arrived the defendant was entertaining the plaintiff to do all in the plaintiff's power to relieve the defendant from the obligations of a burdensome contract. It was unable to sell any of the oats. It wanted no further delivered and returned home. Finally, it notified the plaintiff to sell the contract rate and charge to its loss, it say.

In connection with the area which it is contended that while the court erred in admitting in evidence the correspondence between the parties, the letters and telegrams show that the written directly unconditionally entered into a contract that the plaintiff should endeavor to resell the union rate of the oats which defendant had bought the defendant only for the damage resulting by way of loss from such resale.

The letter contention is said to be open to fact and law. There is nothing in the uniform sales act prohibiting of such an arrangement. This court, then, the only issue of substance presented by the record is whether the plaintiff fulfilled its undertaking to try to sell the oats. The plaintiff's proposition of error No. 1917, was that it could "try hard" to sell them but that it would hold the defendant liable for the difference between the resale and the contract price. In the

following day the defendant telegraphed its acceptance. Properly construed the agreement, created by the letter and telegram, was that, in the event the plaintiff could not dispose of the sets, the defendant was to be liable for the full contract price.

In its affidavit of merits, verified by its secretary, the defendant among other things, stated that it

> "admits that plaintiff was ready and willing and tendered and offered to deliver said onion sets to the defendant on the first of March, A. D. 1927, and admits that the plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said onion sets should be shipped, but defendant denies that it was then and there requested to pay therefor; the said defendant further states that after the plaintiff had requested it for shipping instructions and after defendant had failed to furnish the same, the said plaintiff at the request of said defendant, sold or otherwise profitably disposed of said onion sets it was so holding for defendant aforesaid."

Upon the trial of the case counsel for the defendant moved to expunge from the affidavit the words:

> "Defendant admits that plaintiff was ready and willing and tendered and offered to deliver said onion sets to the defendant on the first of March, A. D. 1927, and admits that plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said onion sets should be shipped."

The motion was denied and properly so. The court then permitted the attorney who prepared the affidavit to testify that when he prepared it he was not familiar with the facts except from the correspondence; that he did not communicate with Charles M. Storey who verified the affidavit and that he did not intend to make the admissions contained in the words sought to be expunged. In this we think the court erred. The secretary of the defendant should not have made the affidavit and it should not have remained on file until the trial of the case if it did not speak the truth. But it is pointed out that the affidavit was filed with the pleas to the original counts of

following day the defendant telegraphed its acceptance. "Accordingly construed the agreement, created by the letter and telegram, was that, in the event the plaintiff could not dispose of the sets, the defendant was to be liable for the full contract price.

In its affidavit of merits, verified by its secretary, the defendant among other things, stated that it

> "admits that plaintiff pay freight and drayage and tendered and offered to deliver said union sets to the defendant on the first of March, A. D. 1907, and admits that the plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said union sets should be shipped, but defendant denies that it was then and there requested to pay drayage; the said defendant further states that after the plaintiff had requested it for shipping instructions and after defendant had failed to furnish the same, the said plaintiff at the request of said defendant, said or otherwise wrongfully disposed of said union sets it was so holding for defendant's account."

Upon the trial of the case counsel for the defendant moved to exclude from the plaintiff's evidence the words:

> "defendant admits that plaintiff was ready and willing to tender and offered to deliver said union sets to the defendant on the first of March, A. D. 1907, and admits that the plaintiff then and there requested it to accept the same and to furnish shipping instructions as to where said union sets should be shipped."

The motion was denied and exception taken. The court then permitted the attorney who prepared the affidavit to testify that when he prepared it he was not familiar with the facts except from the correspondence; that he did not communicate with Charles K. Storey who verified the affidavit and that he did not intend to make the admissions contained in the words sought to be excluded. It is hard to think the court erred. The secretary of the defendant should not have made the affidavit and it should not have remained on file until the trial. Either she or it did not speak the truth. But it is a pointless act that the affidavit was filed with the clerk to the original counsel of

the declaration and that additional counts were afterwards filed, raising different issues, without an affidavit of claim and without requiring a further affidavit of merits. This, however, does not change the character of the affidavit as an admission that the plaintiff was ready and offered to perform within the time provided for delivery under the contract, that the defendant failed to furnish shipping instructions and finally that the defendant requested the plaintiff to sell the "onion sets it (the plaintiff) was holding for defendant."

Finally counsel for the defendant say in their brief that,

> "It is clear from the evidence in this case that in the first half of March 1927, which was the time provided by the contract for delivery, the goods might readily have been resold at a reasonable price."

But the defendant in its letter of March 5, 1927 and in its affidavit of merits took the position that the contract did not call for delivery until the latter part of March 1927. This is contrary to the express provisions of the contract but it shows the desire on the part of the defendant to have delivery delayed. It was not until March 30, 1927 that it took any definite action. Upon the insistence of the plaintiff it authorized a sale of all the onion sets, the loss to be charged to it.

Whether the plaintiff could have sold the sets after it received authority so to do, presented a question of fact for the jury. The president of the company testified that he could not sell them and that at the end of the season the plaintiff had about 10,000 bushels of sets of its own which it was unable to dispose of. He further testified that he authorized a representative of the defendant to sell under the name of the plaintiff and furnished him with order blanks for that purpose.

the deadlocation and that additional costs were therefore filed, raising different issues, without an affidavit of claim and without requiring a further affidavit or merits. This, however, does not change the character of the affidavit as an admission that the plaintiff was ready and willing to perform within the time provided for delivery under the contract, that the defendant failed to furnish the delivery instructions and finally that the defendant repudiates the plaintiff's to sell the goods as the plaintiff was holding for defendant".

Finally counsel for the defendant say in their brief that,

> "It is clear from the evidence in this case that in the first half of March 1967, which was the time provided by the contract for delivery, the goods might reasonably have been resold at a reasonable price."

But the defendant in its letter of March 3, 1967 and in its affidavit of merits does not mention that the contract did not call for delivery until the latter part of March 1967. This is contrary to the express provisions of the contract but it raises the doubts on the part of the defendants to have delivery delayed. It was not until March 30, 1967 that it took any definite action. Upon the last issue of the plaintiff's entitlement to sale of all the goods sold, the issue to be decided is:

Whether the plaintiff could have held the goods after it received authority to do so, raised a question of fact for the jury. The defendants of the company to allege that to sell then was not at the cost of the plaintiff and finally had about 17,000 bushels of corn at its elevator which it disposed of. He further testified that he received a representative of the defendant as well under the same as the plaintiff and furnished him with every details for sale purpose.

This was admitted by the defendant's witnesses.

It is next urged that the court committed reversible error in instructing the jury that, under the contract, the defendant was required to give shipping instructions before the plaintiff could be called upon to perform its part of the contract. Much refinement of reason is indulged in about the proper construction of the contract and particularly as to the meaning to be given the words at the bottom of the contract "Will advise" inserted in the handwriting of the president of the defendant company, after the words "Ship via." The president of the plaintiff testified that in the trade these words meant that the purchaser was required to give shipping instructions. This was not denied by anyone, but it is contended that the plaintiff failed to lay a proper foundation for proof of a custom. The point is without merit. We assume that the words "Will advise" when used in connection with the words "Ship via" mean that before the seller shall be required to perform he is to receive from the buyer instructions of some kind pertaining to shipment. In fact this was the construction adopted by the parties. The plaintiff was repeatedly demanding shipping instructions and the defendant, in several of its replies, promised to give them at a later date. This was admitted in the defendant's affidavit of merits. But whatever be the correct interpretation of the contract, it suffices to say that the plaintiff was not at any time called upon to perform its part of the contract because the defendant was continually advising the plaintiff that it (the defendant) did not want the onion sets delivered. If there was error in the giving of the instructions it was harmless.

One of the defenses interposed by the defendant was an accord and satisfaction. It is clear from the correspondence,

This was admitted by the defendant's witnesses.

It is next urged that the court committed reversible error in instructing the jury that, under the contract, the defendant was required to give shipping instructions before the plaintiff could be called upon to perform its part of the contract. Upon reviewment of reason is indicated in about the proper construction of the contract and particularly as to the wording to be given the words at the bottom of the contract "all advise" inserted in the handwriting of the president of the defendant company, after the words "Ship via." The president of the plaintiff testified that in the trade these words mean that the purchaser was required to give shipping instructions. This was not denied by anyone, but it is contended that the plaintiff failed to lay a proper foundation for proof of a custom. The point is without merit. We assume that the words "all advise" when used in connection with the words "Ship via" were put before the seller should be entitled to perform he is to receive from the buyer instructions of some kind without waiting to obtain it. In fact this was the construction adopted by the parties. The plaintiff was repeatedly corresponding with the defendants and the defendant, in several of its letters, promised to give them at a later date. This was contained in the telegrams of April 27th of merit. The answer be the matter of interpretation of the contract, it suffices to say that the plaintiff was not at any time called upon to perform its part of the contract because the defendant was continually avoiding the question of when it (the defendant) or not what the union made delivered. It there was error in the giving of the instructions it was harmless.

The of the defendant introduced [illegible] was an accord and satisfaction. It is clear from the [illegible]

however, that the 5,000 pounds of onion seeds were never accepted in satisfaction of plaintiff's claim for damages. The plaintiff ordered the seed saying that it would credit the defendant's account at one dollar per pound. The defendant replied by telegram that it was shipping the seed as instructed. The subsequent letter of the defendant that the seed "must be accepted with the understanding that this represents the full amount of allowance that we will make on our contract with you for onion sets" could not bind the plaintiff because the plaintiff promptly advised the defendant that this condition was not acceptable.

Finally it is urged that the verdict is excessive because no credit was given for the five thousand pounds of onion seeds which were valued by the parties at $5,000.00. The basis for this contention is that the plaintiff accepted and agreed to pay for the seeds and that the verdict of the jury upon the attachment issue establishes that fact. With this contention we cannot agree. The verdict and judgment in the assumpsit case are in favor of the plaintiff. The only question before us is whether the judgment should stand. Furthermore the defendant should not be permitted to assume the inconsistent position of claiming that the onion seed was accepted in full satisfaction of the plaintiff's demands and in the alternative that credit should be given for its agreed value.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

however, that the 3,000 pounds of onion seeds were never accepted in satisfaction of plaintiff's claim for damages. The plaintiff ordered the seed saying that it would credit the defendant's account at one dollar per pound. The telephone replied by telegram that it was shipping the seed as instructed. The subsequent letter of the defendant that the seed 'must be accepted with the understanding that this represents the full amount of allowance that we will make on our cost of with for onion seed' could not bind the plaintiff because the plaintiff promptly advised the defendant that this condition was not acceptable.

Finally it is urged that the verdict is excessive because no credit was given for the five thousand pounds of onion seeds which were valued by the parties at $3,000.00. The basis for this contention is that the plaintiff accepted and agreed to pay for the seeds and that the verdict of the jury gives the attorneys fees satisfaction that fact. With this contention we cannot agree. The evidence and judgment in the commercial case are in favor of the plaintiff. The only question before us is whether the judgment should stand. Attorneys for defendant should not be permitted to change the fundamental position of claiming that the onion seed was rejected in full a first order of the plaintiff's demands and in the alternative that credit should be given for the spread value.

The judgment of the superior court of Ada County is affirmed.

.....

KLOSTER, C.J., and DONSON, J., concur.

33308

MIGNON COMPART, By Florence Compart, Her Mother and Next Friend,

Plaintiff-Appellee,

v.

F.E. TARRANT,

Defendant-Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed Nov. 6, 1929

MR. JUSTICE RYNER delivered the opinion of the Court.

The plaintiff, a minor, brought suit, by her next friend, in the Superior Court of Cook County, to recover damages for an injury to her leg resulting from a large cement vase or flower pot falling upon it, while she was upon the premises of the defendant. The jury returned a verdict in her favor and assessed her damages at $500.00. The court entered judgment upon the verdict and the defendant appealed.

There is no substantial dispute of facts as to how the accident happened. The defendant was the owner of a three-flat building facing upon Sheridan Road in the City of Chicago. The front of the building sat back 29 feet from the front lot line. There was a concrete walk leading from the sidewalk to the front of the building. At the end of this walk eight concrete steps lead up to the entrance of the building. On one side of the steps was a concrete banister about one foot in width and at an incline the same as that of the steps. At the bottom of the bannister was a pillar made of brick and concrete, about one foot square at the top and about 31 inches in height. The vase in question rested on the top of the pillar. It was made of sandstone and was of ordinary design. It was eleven inches in height, twenty inches in diameter at the top, eleven inches in diameter at the base, and weighed 110 pounds. It was not fastened to the pillar.

23306

Alonzo Conway by Interest Compert,
Her husband next friend,

Plaintiff-Appellee,

v.

F.E. Tabone,

Defendant-Appellant.

Opinion filed Nov. 6, 1929

MR. JUSTICE STAKE delivered the opinion of the Court.

The plaintiff, a minor, brought suit, by her next friend, in the superior court of Lake County, to recover damages for an injury to her leg resulting from a large concrete wall or flower pot falling upon it, while she was upon the premises of the defendant. The jury returned a verdict in her favor and assessed her damages at $[illegible]. The court entered judgment upon the verdict and the defendant appealed.

There is no substantial dispute of facts as to how the accident happened. The defendant was the owner of a three-flat building facing upon [illegible] in the city of [illegible]. The front of the building was about [illegible] feet from the front lot line. There was a concrete wall leading from the sidewalk to the front of the building. At the end of this wall stood a concrete stone land up to the entrance of the building. On one side of the stone was a concrete pedestal about one foot in width and at an height the same as that of the stone. At the bottom of the pedestal was a [illegible] which was [illegible], about one foot square at the top and about [illegible] inches in height. The case in question rested on the top of the pedestal. It was made of sandstone and was of ordinary design. [illegible] inches in height, twenty inches in diameter at the top, [illegible] inches in diameter at the base, and weighed 125 pounds. It was not fastened to the pillar.

A tenant of the defendant had three small children. The plaintiff was in the habit of playing with them and, on the day the accident happened, the plaintiff and several small boys and girls were playing in front of the defendant's premises. A number of the children, just before the accident occurred, were sliding down the banister. When they reached the bottom their feet struck against the vase. They continued to do this until the vase was moved to the edge of the pillar and finally fell off, striking the plaintiff's leg.

No error has been assigned as to the amount of the damages. We find no reversible error committed by the trial court in its rulings on the admissibility of evidence or in the giving or refusing of instructions. The plaintiff at the time of the accident was five and one-half years of age and therefore could not be charged with contributory negligence. The only question left for our consideration is whether the defendant violated some duty he owed to the plaintiff which should render him liable to respond in damages for the injury sustained by her.

The testimony is undisputed that the plaintiff came upon the premises of the defendant to play, at the request of one of the children of a tenant of the defendant. It appears from the evidence that children in the neighborhood were in the habit of congregating and playing on the front steps and in the hallway of the defendant's building. They caused some annoyance to the occupants of the building by ringing the door-bell, sliding down the banister and making noises in the hallway. They were repeatedly told to play in the backyard. This they generally declined to do. On the day of the accident, the defendant, his wife, his son, and the janitor of the building told the children, including the plaintiff, not to play on the

a tenant of the defendant had three small children.

The plaintiff was in the habit of playing with them, and, on the day the accident happened, the plaintiff and several small boys and girls were playing in front of the defendant's premises. A number of the children, just before the accident occurred, were sitting down the bannister. When they reached the bottom their feet strung against the wall. They continued to do this until the wall was moved to the rope of the bannister finally fell off, striking the plaintiff's leg.

No error has been assigned as to the amount of the damages. We find no reversible error committed by the trial court in its rulings on the admissibility of evidence or in the giving or refusing of instructions. The liability at the time of the accident was five and one-half years. It was not therefore could not be charged with contributory negligence. The only question left for our consideration is whether the defendant violated some duty he owed to the plaintiff which should render him liable to compound the damages for the injury sustained by her.

The testimony is undisputed that the plaintiff came upon the premises of the defendant to play, at the invitation of one of the children of a tenant of the defendant. In consideration the evidence must initiation in the [illegible] the basis of congregating [illegible] in the delivery of the defendant's [illegible]. They caused some annoyance to the occupants [illegible] of sitting the bannister, sliding down the railings [illegible] They were repeatedly told to play in the [illegible]. This they generally desisted in do. On the day of the accident, the defendant, his wife, his son, and the [illegible] told the children, insulting the [illegible], not to play on the

front steps. They, however, continued to slide down the banister until the accident happened. It does not appear that the defendant, or anyone representing him, warned the children of any danger.

The vase in question was placed there by the contractor who constructed the building. The defendant testified that it had been in the same place and condition for four years immediately preceding the date of the accident. This testimony was not contradicted by any witness. There is no evidence that either the vase, or the pillar upon which it rested, was, in any particular, defective in construction.

Although the declaration contained a count charging the defendant with maintaining a nuisance attractive to children, counsel for the plaintiff in his brief says that he did not in the trial court, nor does he in this court, rely upon the doctrine relating to attractive nuisances. The vase was not inherently dangerous to adults or to anyone making proper use of the defendant's premises.

The law is well settled that the owner of property owes the duty of exercising a higher degree of care to protect children of tender years, who are unable to detect and protect themselves from danger than adults. The youth of a child, however, does not supply the lack of negligence on the part of the owner. As was said in Belt Ry. Co. v. Charters, 123 Ill. App. 322,

> "The duty which the law imposes upon the defendant and the ommission of which is actionable negligence is not affected by the age of the plaintiff. His youth does not supply the lack of negligence upon the part of the defendant. He cannot recover unless there was negligence upon the part of the defendant which caused the injury."

front steps. They, however, continued to slide down the bannister until the accident happened. It does not appear that the defendant, or anyone representing him, warned the children of any danger.

The room in question was leased there by the contractor who constructed the building. The defendant testified that it had been in the same place and condition for four years immediately preceding the date of the accident. This testimony was not contradicted by any witness. There is no evidence that either the case, or the manner upon which it rested, was, in any material, defective in construction.

Although the doctrine contained a count charging the defendant with maintaining a nuisance attempts to mislead counsel for the plaintiff in his brief says that we did not in the trial court, nor does he in this court, rely upon the doctrine relating to attractive nuisances. The case is not inherently dangerous to adults or to anyone exercising proper care of the defendant's premises.

The law is well settled that the owner of property does the duty of exercising a higher degree of care for the safety of tender ye ra, who are unable to protect themselves from danger than adults. The young of a child, however, does not supply the lack of negligence on the part of the owner. As was said in Pell v. Co. v. Ehrlich - 111 Ap. 324,

"The duty which the law imposes upon the defendant and the violation of which is actionable negligence is not affected by the age of the plaintiff. A youth does not supply the lack of negligence upon the part of the defendant. He cannot recover unless the negligence was the part of the defendant which caused the injury."

Neither is the owner liable if another and independent element of force intervenes which breaks the relation of cause and effect so that the supposed negligence of the owner is not the proximate cause of the injury. This rule was announced in the case of Anderson v. Karstens, 318 Ill. App. 285, where the plaintiff relied upon the doctrine of attractive nuisance. The principle announced, however, is applicable to the instant case. The court said,

> "This case, as we view the evidence, discloses that there was the intervention of another and independent element which broke the relation of cause and effect and the supposed negligence of defendant was, therefore, not the proximate cause of plaintiff's injury. This intervening cause in this case was the act or acts of other lads who carried the cans from defendant's lot into the alley, poured the contents of one can into the other and then applied the lighted matches which directly brought about the explosion."

Counsel for the plaintiff contends that the issue as to the proximate cause of the accident was one for the jury to decide. This is generally true, but, where the facts are undisputed, the verdict of a jury will not be permitted to stand where the evidence fails to show or tends to show negligence on the part of the defendant which was the proximate cause of the accident. Knaus v. Southern Ry. Co. 245 Ill. App. 192. In that case the court said:

> "Appellee argues that the question of proximate cause is a question of fact for the jury. While that is true, ordinarily, yet if it clearly appears from the undisputed evidence that the damages suffered may not, by any fair process of reasoning, be attributed to the negligence charged, it becomes a question of law."

Considering all of the facts in the record in a light most favorable to the plaintiff, we fail to find proof of any act of negligence on the part of the defendant which could by any fair process of reasoning, be considered the

Neither is the owner liable if another and independent element of force intervenes which breaks the relation of cause and effect so that the supposed negligence of the owner is not the proximate cause of the injury. This rule was announced in the case of Anderson v. Lathrop, 18 Ill. App. 285, where the plaintiff relied upon the doctrine of attractive nuisance. The principle enunciated, however, is applicable to the instant case, the court said,

> "This case, on the view the evidence, discloses that there was the intervention of another and independent element which broke the relation of cause and effect and the supposed negligence of defendant was, therefore, not the proximate cause of plaintiff's injury. This intervening cause in this case was the act of one or other lads who carried the train from defendant's lot into the alley, pushed the contents of one can into the other and then opened the switch which directly brought about the explosion."

Counsel for the plaintiff contends that the issue as to the proximate cause of the accident was one for the jury to decide. This is generally true, but, where the facts are undisputed, the verdict of a jury will not be sustained to stand where the evidence fails to show or tends to show negligence on the part of the defendant which was the proximate cause of the accident. Lenz v. Guilfoyle, 10 Ill. App. 128. In that case the court said:

> "Appellant argues that the question of proximate cause is a question of fact for the jury. It is true in this, as in many other cases, it is directly in dispute from the conflicting evidence that the injury in question may not, by any fair process of reasoning, be attributed to the negligence charged, it becomes a question of law."

Considering all of the facts in the record in light most favorable to the plaintiff, we fail to find that of any act of negligence on the part of the defendant which could be any fair process of reasoning, be traced to the

proximate cause of the plaintiff's injury.

For the foregoing reasons the judgment of the Superior Court of Cook County is reversed and the cause remanded.

JUDGMENT REVERSED AND
CAUSE REMANDED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

proximate cause of the plaintiff's injury.

For the foregoing reasons the judgment of the Superior Court of Cook County is reversed and the cause remanded.

JUDGMENT REVERSED AND
REMANDED.

Gidon, P.J. and Burke, J., concur.

32815

HENRY BRILLE,
Appellee,

vs.

DAVID SAUL KLAFTER and
AMANDA E. KLAFTER,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 I.A. 613

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On February 11, 1929, we filed an opinion in this case where we reversed a judgment for $22,858.91 rendered in favor of the plaintiff and against the defendants in an action of assumpsit. We there held that plaintiff could not recover under the law and in concluding the opinion we said: "It follows that the judgment of the Superior court of Cook county must be reversed but, since there is no dispute as to the facts, it will not be necessary to remand the cause."

The record discloses that on the trial both parties introduced evidence and at the close of all the evidence plaintiff moved the court to instruct the jury to find in his favor and the defendants moved for a similar instruction in their favor. The court denied the defendants' motion but sustained plaintiff's motion and directed a verdict for the plaintiff, upon which judgment was entered. In this court the defendants contended that the court should have directed a verdict in their favor as requested, and this contention we sustained. The case was taken to the Supreme Court on a writ of certiorari and on October 19, 1929, the Supreme Court handed down an opinion reversing the judgment of this court and remanding the cause to this court "with directions either to affirm the judgment, or if there was error in matter of law requiring a reversal, which error can be corrected on another trial, to remand the cause and order that the error be corrected, or, if

22816

HENRY INGRIM,
Appellee,

vs.

DAVID CARL MCARTHUR and
ARABIA E. MCARTHUR,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On February 11, 1929, we filed an opinion in this case where we reversed a judgment for $22,000.00 rendered in favor of the plaintiff and against the defendants in an action of assumpsit. We there held that plaintiff could not recover under the law and in concluding, the opinion so states: "It follows that the judgment of the superior court of Cook County must be reversed but, since there is no dispute as to the facts, it will not be necessary to remand the cause."

The record discloses that on the trial both parties introduced evidence and at the close of all the evidence plaintiff moved the court to instruct the jury to find in his favor and the defendants moved for a similar instruction in their favor. The court denied the defendants' motion and sustained plaintiff's motion and directed a verdict for the plaintiff, upon which judgment was entered. In this court the defendants contend that the court should have directed a verdict in their favor [illegible], and this contention we sustained. The case was taken to the Supreme Court on a writ of certiorari and on October 18, [illegible] Supreme Court handed down an opinion reversing the judgment of the court and remanding the cause to this court "with directions to adhere to affirm the judgment, or if there was error in the [illegible] reversing a reversal, which error can be corrected [illegible] to remand the cause and order that the error be corrected [illegible]

a final judgment is entered, that the ultimate facts found differently from the facts as found by the Superior court shall be incorporated in the judgment."

The ultimate fact which we found different from the Superior court was that the title to the premises fronting on Route 3 was not materially defective. Upon a consideration of all the evidence in the record we came to that conclusion as a matter of law; there being no dispute in the evidence, but one conclusion could reasonably be drawn from it.

The trial court held that there was no question of fact for the jury to decide but that the sole question involved was one of law for the court and accordingly directed a verdict. We were also of the opinion that there was no question of fact for the jury - that the sole question was one of law for the court - but that the court reached a wrong result under the law. In Devine v. Rosenbaum Bros., 192 Ill. App. 30, another division of this court held that the written document was ambiguous and therefore evidence was admissible to explain its meaning; but on a review of this case by the Supreme Court, 271 Ill. 354, it was held that the document was unambiguous and that the evidence was inadmissible. That case is a precedent, if any is needed, for what we did in the instant case.

We are entirely satisfied with the opinion heretofore filed by us in this case, and for the reasons therein stated the judgment of the Superior court of Cook county is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

McSurely, P. J., concurs.

Matchett, J., dissents.

a final judgment is entered, but the ultimate facts found differently from the facts as found by the Superior Court shall be incorporated in the judgment."

The ultimate fact which we found different from the Superior Court was that the right to the premises terminating on Dunbo's was not materially material. Upon a consideration of all the evidence in the record we have to such conclusion as a matter of law; there being no dispute in the evidence, but one conclusion could reasonably be drawn from it.

The trial court had not made any finding of fact for the jury to decide but that the sole question involved was one of law for the court and accordingly directed a verdict. We were also of the opinion that there was no question of fact for the jury - that the only question was one of law for the court - and that the court ruled a wrong result under the law. In Dering v. Hornsby Prop., 191 Ill. App. 3, another division of this court held that the written contract is unambiguous and therefore evidence was inadmissible to explain its meaning; that a review of this case by the Supreme Court, 271 Ill. 78, in no held that the document was unambiguous and that evidence was inadmissible. That case is a precedent, it seems, for what we did in the instant case.

We are entirely satisfied with the opinion filed by us in this case, and for the reasons stated the judgment of the Superior Court of Cook County is reversed with a finding of fact.

Reversed.

McGurchy, P. J., concurs.

Matchett, J., dissents.

32815 FINDING OF FACT.

We find as an ultimate fact that the title to no part of the premises fronting on Route 3 was defective and that the defendants, the sellers, were able to furnish good title thereto.

3REUS FINDING OF FACT.

We find as an ultimate fact that we will, in no part of the evidence tending on Fonte's use defective and that the defendants, the sellers, were duly to hurt ten good title thereto.

33738

JULIUS FRIEDMAN, Administrator of the Estate of Ben Manfield, Deceased,

Appellee,

v.

JOSEPH PECKLER, (Impleaded with MODERN WOODMEN OF AMERICA, a Corporation),

Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

Opinion filed Wednesday, Nov. 27, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Julius Friedman, as administrator of the estate of Ben Manfield, Deceased, filed his bill of complaint, charging that Ben Manfield died April 16, 1929, leaving certain heirs at law and that complainant was duly appointed administrator of his estate May 6, 1929; charges that there was a certain policy of insurance issued by the defendant, Modern Woodmen of America, a fraternal benefit society, incorporated under the laws of the State of Illinois; charges further that prior to his death, said Ben Manfield and the defendant, Joseph Peckler, entered into a certain written agreement (which is set out in full in the bill of complaint) under which the said Manfield agreed to and did name the said defendant Peckler as beneficiary in and to said policy of insurance. Said agreement further provided therein that the said Peckler covenanted and agreed that upon the death of the said Manfield and upon the payment to him of the amount due under the policy, he would immediately pay it over to the executor or administrator of the estate of

38728

JULIUS FIRSCHEN, Administrator of the Estate of Ben Manfield, Deceased,

Appellee,

v.

JOHNSON MODERN MODERN BOOKERS OF AMERICA, a Corporation),

Appellant.

FROM DINGIT COURT,

COOK COUNTY.

INTERLOCUTORY APPEAL

Opinion filed Wednesday, Nov. 27, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Julius Firschen, as administrator of the estate of Ben Manfield, deceased, filed his bill of complaint, charging that Ben Manfield died April 16, 1929, leaving certain heirs at law and that complainant was duly appointed administrator of his estate May 8, 1929, charges that there was a certain policy of insurance issued by the defendant, Modern Woodmen of America, a fraternal benefit society, incorporated under the laws of the State of Illinois; charges further that prior to his death, said Ben Manfield and the defendant, Joseph Poehler, entered into a certain written agreement (which is set out in full in the bill of complaint) under which the said Manfield agreed to and did make the said defendant Poehler his beneficiary in and to said policy of insurance. Said agreement further provided therein that the said Poehler covenanted and agreed that upon the death of the said Manfield and upon the payment to him of the amount due under the policy, he would immediately pay it over to the executor or administrator of the estate of

the said Manfield; charges further that the said defendant, Peckler, has repudiated the terms of said agreement and has repeatedly stated that he would not carry out its terms; charges further that the said defendant, Peckler, is in straightened and impecunious circumstances and has no property on which an execution could be levied in the event a judgment was rendered against him; charges further that complainant is informed and believes that a check is to be delivered to said defendant, Peckler, on the second day of July.

The application for this restraining order was made July 1st, the day before the event, as charged in the bill, was to take place. The affidavit filed in support of said bill charges that in view of the shortness of time, it would be impossible to prepare and serve notices of the application for said injunction and that in the event defendant should be so notified, he would immediately take steps to try to collect said money due under said policy of insurance.

On motion the court entered an order restraining the defendant, Peckler, from collecting, and the Modern Woodmen of America from paying, any money due under said policy until the further order of the court, it appearing to the court that no damage would accrue to either of said defendants by reason of the insurance thereof.

The defendant, Modern Woodmen of America, have not joined in the appeal from the interlocutory decree and are not complaining of the decree of the court granting the restraining order. It was served with notice of the proceeding. No specific assignment of error appears as to the issuance of the injunction as to the defendant Modern Woodmen of America.

the said Bankruptcy; charges further that the said defendant, Poehler, has repudiated the terms of said agreement and has repeatedly stated that he would not carry out its terms; charges further that the said defendant, Poehler, is in straightened and impecunious circumstances and has no property on which an execution could be levied in the event a judgment was rendered against him, charges further that complainant is informed and believes that a check is to be delivered to said defendant, Poehler, on the second day of July.

The application for a rule taking order was made July 1st, the day before the event, as observed in the bill, was to take place. The affidavits filed in support of said bill charges that in view of the circumstances of it, it would be impossible to prepare and serve notices of the application for said injunction and that in the event defendant should be so notified, he would immediately take steps to try to collect said money due under said policy of insurance.

On motion the court entered an order restraining the defendant, Poehler, from collecting, and the Mutual Insurance of America from paying, any money due under said policy until the further order of the court, it appearing to the court that an injury would accrue to either of said defendants by reason of the irreparable injury.

The defendants, Louis Bonnem & Sons, filed a petition, and on leave in the appeal from the interlocutory order and on the complaining of the dueness of the court granting the interlocutory order. It was proved with notice of the proceeding. In specific assignment of error [illegible] as to the jurisdiction of the injunction as to the interlocutory order [illegible].

Moreover it appears from the Brief of Peckler in General Number 33956, a subsequent appeal in the same cause, that the money has been paid into court, under an order of the Chancellor, on motion of the defendant Modern Woodmen of America.

It is urged that the allegations of the bill of complaint and the accompanying affidavit, did not warrant a court of equity in issuing an injunction without notice; that there are no allegations in the bill, from which the court could find that complainant would be unduly prejudiced if the injunction did not issue forthwith without notice; that the injunction should not have been issued without first requiring complainant to give bond in accordance with the statute.

Without going into the merits of the controversy, and confining this opinion merely to the question as to whether there were sufficient allegations in the bill of complaint to justify the court in issuing the injunctional order, we are of the opinion after a reading of the bill and the affidavit that there were sufficient allegations of fact set forth in the sworn bill and affidavit to justify the court in ordering the injunction to issue without notice, and further, that there were sufficient facts stated together with the finding of the court in its decretal order, that would justify the granting of the application for the restraining order without bond by the complainant.

For the reasons stated in this opinion, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

Moreover it appears from the brief of counsel in Bertens Brother Lodge, a supplement appears in the case cause, that the money has been paid into court, under an order of the Chancellor, on motion of the defendant Western Bookmen of America.

It is urged that the allegations of the bill of complaint and the accompanying affidavit, did not warrant a court of equity in issuing an injunction without notice; that there are no allegations in the bill, from which the court could find that complainant would be unjustly prejudiced if the injunction did not issue forthwith without notice; that the injunction should not have been issued without first requiring complainant to give bond in accordance with the statute.

Without going into the merits of the controversy, and confining this opinion strictly to the question as to whether there were sufficient allegations in the bill of complaint to justify the court in issuing the injunctional order, we are of the opinion after a reading of the bill and the affidavit that there were sufficient allegations of fact set forth in the whole bill and affidavit to justify the court in granting the injunction to issue without notice, and bond. That there are sufficient facts stated together with the finding of the court in its decretal order, that could justify the granting of the application for the injunction, over a demurrer made by the complainant.

For the reasons stated in this opinion, the decree of the circuit court is affirmed.

[illegible]

[illegible], C. J., concur.

33980

MORRIS ROSENBAUM et al.,
Appellees,

vs.

LEZA SAPOZNIK and MORRIS SAPOZNIK et al.,
Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

255 I.A. 614

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Complainants on June 27, 1929, filed a bill against Leza Sapoznik et al., to foreclose a trust deed which conveyed certain premises to secure an indebtedness of $17,600. The bill alleged that the premises were also encumbered by a prior first mortgage given to secure an indebtedness of $65,000. It also alleged the insolvency of the debtors and that the premises were inadequate security for the indebtedness.

On July 1, 1929, an order was entered appointing the Chicago Title & Trust Company receiver with the usual powers. This order directed that the complainants file their bond in the sum of $500. Subsequently the receiver filed its acceptance of the appointment and thereafter orders were from time to time entered authorizing the employment of counsel and directing that certain defendants show cause why they should not be punished for contempt; that certain payments be made by the receiver and that a writ of assistance issue in its favor against some of the parties.

Certain defendants answered the bill and filed a cross-bill, to which answers were filed.

Thereafter Clarence L. Coleman filed a bill to foreclose the first mortgage, and upon his motion an order was entered on September 18, 1929, which provided that the receivership should be extended "to cover the lien of the Trust Deed as security for the principal note and interest coupon notes sought to be fore-

MORRIS SAPOZNIK et al.,
Appellees,

vs.

LENA SAPOZNIK and MORRIS
SAPOZNIK et al.,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE MACNAMARA DELIVERED THE OPINION OF THE COURT.

Complainants on June 27, 1929, filed a bill against Lena Sapoznik et al., to foreclose a trust deed which conveyed certain premises to secure an indebtedness of $17,500. The bill alleged that the premises were also encumbered by a prior first mortgage given to secure an indebtedness of $8,000. It also alleged the insolvency of the debtors and that the premises were inadequate security for the indebtedness.

On July 1, 1929, an order was entered appointing the Chicago Title & Trust Company receiver with the usual powers. This order directed that the complainants file their bond in the sum of $500. Subsequently the receiver filed its acceptance of the appointment and thereafter orders were from time to time entered authorizing the employment of counsel and directing that certain deficiencies were cause why they should not be published for contempt; that certain payments be made by the receiver and that a writ of assistance issue in its favor against some of the parties.

Certain defendants answered the bill and filed a cross-bill, to which answers were filed.

Theodore Clarence L. Coleman filed a bill to foreclose the first mortgage, and upon his motion an order was entered on September 16, 1929, which stipulated that the receivership should be extended "to cover the lien of the trust deed as security for the principal note and interest coupon notes alleged to be inte-

closed" in that case, "which upon good cause shown, after a full hearing, the complainants therein are not required to give bond."

On October 15, 1929, the bond for appeal to this court was filed, and it is now contended that the order of July 1, 1929, was erroneous because a complainants' bond was not filed in accordance with section 55 of the Chancery act and that the clause in that order relative to the complainants not being required to give bond was erroneous upon the authority of Sherman Park State Bank v. Loon Office Bldg. Corp., 238 Ill. App. 450, and Davis v. Blair, 252 Ill. App. 417.

It must, we think, be conceded that the order of July 1st did not meet the requirements of the statute as interpreted by the decisions cited with reference to the bond to be given by complainants. However, the thirty days within which an appeal might be perfected from that order had expired before this appeal was taken, and we cannot agree with the contention of defendants that the entry of the order of September 18th, giving other and further powers to the receiver already appointed, opened up the matter and operated to extend the time within which this appeal might be brought. The provisions of section 122 of the Practice act with reference to the necessity of requiring a bond are not applicable to an order entered extending the powers of a receiver during the course of administration of the receivership estate.

The order is therefore not erroneous, and it will be affirmed, although complainants have not filed any brief.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

closed; in that case, "a lien upon such cargo shall, after a full hearing, the nonpaying shippers are not required to give bond."

On October 15, 1937, the bond for sums to date court was filed. But it is now contended that the order of July 6, 1936, was erroneous because a corporation' bond was not filed in accordance with section 37 of the Judicial Code and that the claims in that order relative to the complainants do not being required to give bond was erroneous upon the authority of Hudson Pack Plant Bank v. Lear Office Bldg. Corp., 286 U.S. 436, 441, and Zenith Plant, 286 U.S. 480, 487.

It seems, we think, be conceded that the order of July 1st did not meet the requirements of the statute as interpreted by the Hudson case cited with reference to the bond to be given by cross-plaintiffs. However, the entirety does within the order, which may be reflected from the time order had in fact before this appeal was taken, and we cannot agree with the contention of plaintiffs that the entry of the order of November 1st, giving under the further powers to the receiver already exercised, amounted to the action and operated to extend the time within which this appeal might be brought. The provisions of section 128 of the Judicial Code are referred to the necessity of requiring a bond be not conditioned to an order entered authorizing the sale of a receiver under the course of administration of the receivership estate.

The order is therefore affirmed, without costs.

Affirmed, although counsel for appellant have contended that it was not bondably, J. J., and Sanborn, J., concur.

33541

MARKY BARLOS,
Appellee,

vs.

JOHN J. THERMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25 I.A. 114

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in an action on the case, wherein the plaintiff sought to recover from defendants as his damages the value of a reasonable commission for the sale of real estate on the theory that they maliciously and wrongfully deprived him of his commission. Under the direction of the court two of the defendants, John P. and George P. Koelanias, were found not guilty. Appellant was found guilty and appeals from a judgment against him on the verdict for $2,400.

The first point urged is that the declaration does not state a cause of action. In that we concur. In substance it alleges that in November, 1924, plaintiff was a licensed real estate broker with whom the property in question was listed for sale at a certain price subject to mortgages of record; that he submitted the same to John and George Koelanias (who are brothers and co-partners) and they verbally agreed to purchase the same on such terms after conferring in regard thereto with defendant Therman, also a real estate broker; that a verbal agreement for division of commissions was then entered into between plaintiff and Therman in the event of a sale to the Koelanias brothers; that thereafter defendants agreed to meet plaintiff for the purpose of drawing up a written contract and failed to keep their promise, and "maliciously and wrongfully contriving and intending to deprive plaintiff of his real estate commission failed and

[illegible]

MARY BURLEY,
Appellee,

vs.

JOHN J. [illegible],
Appellant.

[illegible]

[illegible]

[illegible]

DELIVERED THE OPINION OF THE COURT.

This is an action upon a judgment in an action on the case, wherein the plaintiff sought to recover from defendants as his damages the value of a reasonable consideration for the sale of real estate on the theory that they maliciously and fraudulently deprived him of his consideration. Under the direction of the court two of the defendants, John F. and George I. Bellamies, were found not guilty. Appellant was found guilty and appeals from a judgment against him on the verdict of the jury.

The first point urged is that the evidence does not state a cause of action. In [illegible] counsel allege that in November, 1909, Frederick [illegible] a [illegible] estate broker with whom the property in question was listed for sale at a certain price, asked him to determine if there; then he submitted the case to John and George Bellamies, who are brothers and partners; and they verbally agreed to purchase the land on such terms after conference in regard thereto with defendant Thomas, who is real estate broker; that a verbal [illegible] division of commissions was [illegible] and Thomas in the event of a sale to the [illegible]; that thereafter defendants entered [illegible] drawing up a written contract [illegible] and "maliciously and wrongfully [illegible] to deprive plaintiff of his real estate [illegible]

neglected to keep said promise and to purchase said real estate, but on the contrary, without knowledge or consent of plaintiff submitted another person to the owner of said real estate, and said defendants wrongfully procured such person to enter into a written contract for the purchase of said real estate" and to obtain title thereto "for the use and benefit of defendants *** and concealed from and failed to disclose to the owner thereof and from plaintiff the fact that said purchase of said real estate had been made by said defendants for their said use and benefit."

The allegations in the declaration are almost identical in substance and character with those in the declaration in the case of Hansberry v. Halloway, 332 Ill. 334, and rest upon the same theory, namely, that where through the agency of a real estate broker a prospective purchaser verbally agrees to enter into a written contract for the purchase of real estate on the owner's terms but fails to keep such promise and enters into an arrangement with another party or broker who negotiates the purchase in the name of a third person for the prospective purchaser's benefit and conceals the identity of the real purchaser from both the owner and the first broker and plaintiff is thus prevented from receiving a commission, a right of action on the case will lie against the second broker on the theory that he has wrongfully deprived the first broker of his commission. It was there held that the declaration did not state a cause of action.

As was said in that case, a verbal agreement to buy real estate is not binding, and a prospective purchaser has the legal right to refuse to carry out the verbal contract, if he sees fit, without incurring any liability to the agent for a commission. It is also true that no right to a commission from the owner would

neglected to keep said premiums and to procure said insurance, but on the contrary, through knowledge or consent of plaintiff substituted another person in the owner of said real estate, and said defendants wrongfully procured such person to enter into a written contract for the purchase of said real estate and to obtain title thereto "for the use and benefit of defendants and concealed from and failed to disclose to the owner thereof and from plaintiff the fact that said purchase of said real estate had been made by said defendants for their sole use and benefit."

The allegations in the declaration are much similar and in substance are whatever they have in the declaration in the case of Lumbrazier v. Ballard, 208 Ill. 324, and that upon the same theory, namely, that under the guise of a real estate broker a professedly unknown actually agrees to enter into a written contract in the purchase of real estate in the owner's name but fails to keep such promise and enters into an arrangement with another party or broker who negotiates the purchase in the name of a third person for the prospective profits and conceals the identity of the real purchaser from the owner and the first broker who plaintiff is then prevented from receiving a commission. A right of action on the case will lie against the second broker on the theory that he has induced the plaintiff to breach of his commission. In the instant case the defendant did not state a cause of action.

As was said in that case, a right of action in favor real estate is not similar, and a professional commission has the legal right to refuse to carry out the verbal contract, if it does so, without incurring any liability to the [illegible] commission. It is also true that no right to a commission [illegible]

accrue to the broker by reason of the mere failure of his customer to carry out a verbal promise to make the purchase. The Koclanias brothers were under no legal duty to carry out their verbal promise to buy, and Therman, with whom plaintiff had no contractual relations, except for a division of the commissions in case of a sale to the Koclanias brothers, owed plaintiff no legal duty unless the sale was made to them or for their benefit and use.

Nor does the alleged agreement for a division of commissions have any bearing upon plaintiff's theory of Therman's liability for a tort. That the Koclanias brothers or Therman had the right to buy directly from the owner cannot be questioned. (Hansberry case, supra, p. 338.)

Similar averments as to deceiving plaintiff, depriving him of his commission, paying it to another, purchasing from the owner for the benefit of his customer in the name of a third person, and concealing the fact as to the actual purchasers, were held in the Hansberry case not to state a cause of action.

The conclusion, therefore, that the judgment here must be reversed and remanded because the declaration fails to state a cause of action obviates the necessity of discussing the evidence although we think appellant's contention that it does not support essential allegations that are contained in the declaration, is well taken in that it fails to show that the Koclanias brothers were able and ready to carry out the proposed deal or that it was ultimately closed for their benefit. On the contrary, the weight of the evidence shows that they were not financially able to carry out the deal alone and did not contemplate a purchase without enlisting the interest or co-operation of others, and that the sale was not for their joint use and benefit but for the use and benefit of one of them only together with said Therman and two other parties who had not been brought into the negotiations by

source to the broker by reason of the mere failure of his salesman to carry out a verbal promise to make the purchase. The moldering brothers were under no legal duty to carry out their verbal promise to buy, and therefore, with whom plaintiff had no contractual relations, except for a violation of the commissions in case of a sale by the Moldering brothers, good plaintiff no longer duty unless the sale was made to them or for their benefit and use.

Nor does the alleged agreement for a division of commissions have any bearing upon plaintiff's theory of Thomas's liability for a tort. That the Moldering brothers or Thomas had the right to buy directly from the owner cannot be questioned. (Moldering case, supra, p. 224.)

Similar reasoning as to developing liability, derivative his of his commission, paying it to another, proceeding from the owner for the benefit of his employer in the guise of a third person, not concerning the fact of the actual performance, were held in the Moldering case not to state a cause of action.

The conclusion, therefore, that the judgment here must be reversed and remanded because the demurrer fails to state a cause of action obviates the necessity of discussing the evidence although we think conclusive that it does not support essential allegations that are contained in the demurrer, in well taken in that it fails to show that the contending brothers were able and ready to carry out the proposed deal or that it was ultimately chosen for their benefit. On the contrary, the weight of the evidence shows that they were not financially able to carry out the deal alone and did not consummate a purchase without satisfying the interest of a-nonparticipation of others, and that the sale was not for their joint use and benefit [illegible] for the use and benefit of one of them only [illegible] and no other parties who had not been brought into the negotiations by

plaintiff. It was an essential fact to plaintiff's theory of liability in depriving him of a right to the commission that not only should he have earned a commission by procuring a purchaser ready, able and willing to accept the seller's terms, but that the sale ultimately effected was made to, or for the benefit and use of, the same parties he had so procured. The evidence does not so show. Plaintiff, therefore, was not entitled to recover either under the declaration or upon the evidence adduced under the issues formed.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

plaintiff. It was an essential fact to plaintiff's theory of liability in depriving him of a right to the consideration that he only should be have earned a commission by procuring a purchaser ready, able and willing to accept the owner's terms, but that the sale voluntarily effected was made to, or for the benefit and use of, the same person he had so produced. The evidence does not so show. Plaintiff, therefore, was not entitled to recover either under the contract or upon the evidence adduced under the issues formed.

REVERSED AND MODIFIED.

Concur and Ordaby, JJ., concur.

33851

255 A. 614

AMERELL BATTERY CONTAINER CORPORATION, a corporation,
Appellant,

v.

SNYDER & HAY, Inc., a corporation, and the FORRMAN TRUST AND SAVINGS BANK, a corporation,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing for want of equity the original bill (filed by appellant and others) and granting the prayer in the cross bill of appellee Snyder & Hay, Inc., asking that appellee bank, a cross defendant, deliver to it $15,000 which it had deposited in escrow with said bank pursuant to the contract hereinafter referred to on which complainant predicated its claim for relief.

Said contract was entered into May 7, 1927, between said Snyder & Hay, Inc., as the first party, and all of the shareholders and owners of the capital stock of two companies, appellant and the Belle-Byfield Corporation, as the second parties. By it all of said stockholders and owners gave Snyder & Hay, Inc., an option to purchase all of the capital stock of said two companies on or before July 2, 1927, for the price of $300,000 in cash, to be paid to the second parties in proportion to their respective stock holdings. Pursuant to the terms of the contract all the certificates of the capital stock of said two companies were deposited, duly endorsed, together with a check of said Snyder & Hay, Inc., for $15,000, in escrow with said bank. The contract provided that if for any reason, except as prescribed in paragraph 7 thereof, said first party should fail, neglect or refuse

[illegible] a corporation,
Appellants,

vs.

[illegible] a corporation,
and the [illegible]
[illegible], a corporation,
Appellees.

[illegible]

[illegible] THE DEPARTMENT OF THE [illegible]

[illegible]

This appeal is from a decree [illegible] for want of equity
the original bill (filed by appellant and others) and granting the
prayer in the cross bill of appellee [illegible], Inc., [illegible]
appellee [illegible], a cross [illegible], filed [illegible] dismissing the bill
dependent in [illegible] with [illegible] pursuant to the [illegible]
after [illegible] [illegible] complainant [illegible] for [illegible]

[illegible] entered [illegible] May 7, 1945, between [illegible]
[illegible], Inc., as the first party, [illegible] of the [illegible]
and [illegible] of the original [illegible] of the [illegible], appellant and the
[illegible]-[illegible] corporation, as the [illegible] [illegible] of all of said
[illegible] and [illegible] [illegible], Inc., an option to pur-
chase all of [illegible] [illegible] [illegible] or before
July 2, 1947, for the price [illegible] [illegible] to be paid to the
[illegible] parties in proportion to [illegible] [illegible] of stock, pur-
suant to the terms of the contract [illegible] [illegible] of the original
stock of said two [illegible] [illegible] [illegible] [illegible]
a check of [illegible] [illegible], Inc., [illegible] [illegible]
The contract provided [illegible] [illegible] as [illegible]
paragraph 7 thereof, [illegible] [illegible] [illegible] [illegible] or [illegible]

to exercise the option the $15,000 should be paid by the bank to appellant as its own property, and said shares of stock be returned to the respective stockholders.

Paragraph 7 of the contract reads as follows:

> "It is understood and agreed that in the event the net assets of the Ahlbell Battery Container Corporation upon the examination and inspection by the party of the first part are not of a value substantially equal to that shown upon the Company's balance sheet of February 28, 1927, said value to be determined by accounting principles now generally accepted and applied to corporation book-keeping by accountants, the said first party shall not be obligated to proceed, and that the Fifteen Thousand ($15,000) Dollars deposited with The Foreman Trust And Savings Bank, as hereinbefore set forth, shall at the election of the party of the first part, be returned to it and the stock released unto said second party."

The original bill sought to have the bank pay over the $15,000 to complainant and to deliver the certificates of stock back to the said several stockholders on the sole ground that Snyder & Hay, Inc. had wholly failed and neglected to exercise the option given in the contract. The cross bill sought the return of the $15,000 to cross-complainant on the ground that the assets of complainant were not on the date of the contract or thereafter during the period of the option substantially equal to that shown by said balance sheet.

On stipulation of the parties after the hearing the certificates of stock were so returned, thus eliminating the parties of the second part to the contract from the controversy here involved, and the escrow (after allowances to the bank) was converted into a certificate of deposit of $14,772 which the decree ordered the bank to deliver to cross-complainant.

The main question presented is whether the proof adduced by cross-complainant was sufficient to support the finding of the master that the net assets of complainant corporation on May 7, 1927, (the date of the contract) or thereafter before July 31, 1927, (when the option expired) were not of a value substantially equal to that

to exercise the option the $15,000 should be paid by the bank to applicant as its own property, and said shares of stock be returned to the respective shareholders.

Paragraph 7 of the contract reads as follows:

> "It is understood and agreed that in the event the net assets of the Nikell Battery Container Corporation upon the examination and inventoring by the party of the first part are not of a value substantially equal to those shown upon the Company's balance sheet of February 20, 1927, said value to be determined by accounting principles now generally accepted and applied to corporation book-keeping by accountants, the said first party shall not be obligated to proceed, and that the fifteen thousand ($15,000) dollars deposited with the Peterson Trust and Savings Bank, as hereinbefore set forth, shall at the election of the party of the first part, be returned to it and the stock released unto said second party."

The original bill sought to have the bank pay over the $15,000 to complainant and to deliver the certificates of stock back to the said several stockholders on the sole ground that Ryder & Hay, Inc. had wrongfully failed and neglected to exercise the option given in the contract. The cross bill sought the return of the $15,000 to cross-complainant on the ground that the grounds of complaint were not on the date of the contract or thereafter within the period of the option substantially equal to those shown by said balance sheet.

On acquisition of the property after the making the certificates of stock were to be issued, thus eliminating the portion of the second part to the contract from the picture by their transfer, and the escrow (after allowance to the bank) was converted into a certificate of deposit of $15,000 which is decree ordered the bank to deliver to cross-complainant.

The main underlying proposition in defense was proved [illegible] by cross-complainant was sufficient to support the finding of the master that the net assets of complainant corporation on May 1, 1927, (the date of the contract) or thereafter before July 1st, 1927, (when the option expired) were not of a value substantially equal to those

shown upon said balance sheet. In other words, appellant contends that cross-complainant did not prove its case by competent evidence. The asset, the value of which cross-complainant brings in question, appears on said balance sheet as "Bello-Byfield Corporation .....13,377.73," under the classification "Deferred Assets."

As tending to show that the said item had no appreciable value cross-complainant introduced in evidence conversations had in the course of its investigation into the assets of complainant with Marino Bello, president of both complainant and of the Bello-Byfield Corporation. Appellant's case rests mainly on the contention that these conversations were incompetent, irrelevant and not binding on appellant, and that without them no case was made for cross-complainant. In them, as testified to, Bello told cross-complainant's vice president in effect that the Bello-Byfield Corporation had no assets and that it was just a device to hold contracts and some patents - "just a mere shell." So far as these statements are concerned a discussion of the contention is unnecessary. They may be wholly disregarded if the conversations so far as they pertain to the item in question were properly received in evidence. In such conversations that item became the subject of inquiry and discussion and Bello stated that it represented two contracts entered into between the Bello-Byfield Corporation, and two of its employees, one Boney and one Small, hereinafter referred to, which Bello thought had actual value. Under par. 3 of the contract it was agreed that cross-complainant as first party might make such investigation "as to it may seem advisable" not only of the books of account and records of both the Ahlbell and the Bello-Byfield Corporation but all other assets and to that end might use the services and time of their employes. Bello, being president of appellant and presumably acquainted with its assets, was unquestionably a proper person to

stand upon said balance sheet. In other words, appellant contends that cross-complainant did not prove its case by competent evidence. The assets, the value of which cross-complainant brings in question, appears on said balance sheet as "Bello-Byfield Corporation ....[illegible]," under the classification "Deferred Assets."

It seems to us now that the main item had no appreciable value cross-complainant introduced in evidence conversations had in the course of its investigation into the matter of arrangement with Messrs Bello, pursuant to [illegible] complainant and of the Bello-Byfield Corporation. Appellant's case rests mainly on the contention that these conversations were in substance, irrelevant and not binding on appellant, and that [illegible] them [illegible] cross-complainant. [illegible] we are satisfied [illegible] cross-complainant's [illegible] the Bello-Byfield Corporation had no assets [illegible] contracts and some property - [illegible] just a [illegible] shell, [illegible] statements [illegible] concurred [illegible] the conclusion is unnecessary. They may be wholly disregarded [illegible] conversations [illegible] they pertain to the item in question [illegible]. In such conversations [illegible] the degree of interest and discussions had [illegible] entered into between the Bello-Byfield [illegible] its employees, one [illegible] had actual value. Under par. 5 of the contract [illegible] agreed that cross-complainant [illegible] so it may [illegible] advisable [illegible] of both the [illegible] and the Bello-Byfield [illegible] assets [illegible] employees. Bello, [illegible] with its [illegible]

be consulted with regard thereto. Under such circumstances cross-complainant was privileged to consult him with respect to the character of appellant's assets and of what they consisted. The character of the item was not indicated on its face. Inquiry was necessary to determine to what it referred. Cross-complainant certainly had a right to rely on the statement of appellant's president as to what it consisted of in order to pursue its investigation as to its value. We think, therefore, Bello's statement was competent and binding upon appellant, whose property the $15,000 was to become, under the terms of the contract, in the event cross-complainant did not avail itself of the option and was not justified in so doing under said paragraph 7.

In the conversations had cross-complainant's vice-president questioned whether said two contracts had any value and Bello stated that he believed they had. There was no proof tending to establish that they did have any appreciable value - at any rate, any such value as given to the item on the balance sheet. On the contrary, to show that they had no value cross-complainant introduced in evidence the contracts and testimony of both Boney and Small, with whom they were made, with regard to their services thereunder, which clearly tended to show that they had no financial or potential value. The contract with each called for his services to the Bello-Byfield Corporation for a period of three years from July 1, 1926, at the rate of $100 a week unless sooner terminated by mutual agreement. The services each was required to render were mainly of an experimental nature, namely, "to devise and improve as far as he was able such processes and methods of application in a commercial way as he is capable of in connection with any subject or investigation or experimentation that he may work upon." The contract also required that all processes and methods that might be developed thereby were to become the property of the Bello-Byfield Corporation, and

be consulted [illegible]. Under such circumstances cross-complainant was privileged to consult him with respect to the character of appellant's causes and of what they consisted. The character of the loss was not indicated on its face. Inquiry was necessary to determine of what it consisted. Cross-complainant certainly had a right to rely on the statement of appellee's president as to what it consisted of in order to pursue his investigation as to its value. We think, therefore, Hollin's statement was competent and binding upon appellant, whose property the $15,000 was to become, under the terms of the contract, in the event cross-complainant did not avail himself of the option and was not justified in so ruling under said paragraph 7.

As the owner [illegible] of cross-complainant's wife-president questioned [illegible] the notes [illegible] value and Hollin stated that he believed them good. There was no proof tending to establish that they [illegible] any substantial value, or any value, any cash value, [illegible] the balance stated. On the contrary, it shows that they [illegible] value. Cross-complainant introduced in evidence the contracts and [illegible] with whom they were made, with [illegible], which clearly tend to show that they had [illegible] potential value. The contract [illegible] Hyfield [illegible] at the rate of $200 a week [illegible] ment. The [illegible] experimental [illegible], namely, [illegible] while such [illegible] or to be [illegible] or experimentation [illegible] granted [illegible] all [illegible] by race to become the property [illegible]

that the employe was not to assign his right, title and interest with regard thereto to any other person. The evidence of Boney and Small disclosed that Boney continued in the employment under said contract until March 31, 1928, and Small under his contract until May 1, 1928; that while in such employment they took out no patents, made no assignments of any inventions or devices to the Bello-Byfield Corporation, and, in fact, made no inventions. Their testimony, therefore, tended to establish that the item in question possessed no real value - that in fact it represented nothing further than services that had been rendered for wages, the value of which, if any, would be embraced in some other assets. Their testimony together with proof of what the item consisted made out a prima facie case for cross-complainant sufficient to justify the finding with regard thereto and the decree in the absence of any testimony on the part of appellant to refute such proof.

It is argued by appellant that in the absence of any other proof as to what the assets consisted of on May 7, 1927, cross-complainant failed to prove its case. Cross-complainant was not required to make proof of what appellant's assets consisted on that date or any other date. In the absence of any other proof the presumption would obtain that they were of the value represented on the balance sheet, but not that they exceeded such value. In our opinion when cross-complainant proved a deficiency of value in one item of over $13,000 it devolved upon plaintiff to show, if it could, that there was a sufficient excess of value in the other items to meet such deficiency. In the absence of such proof we think the master was justified in finding on the proof aforesaid as to the item in question that the value of the net assets of appellant was not on the date of the contract substantially equal to the total amount as represented on the balance sheet. If the two contracts of which the item in question consisted had developed into nothing of value up to the end of the employment of Boney and Small,

that the employee was not to assign his rights, title and interest with regard thereto to any other person. The presence of Jones and Small disclosed that Fenwy continued in the employment under said contract until March 31, 1956, and Small made his contract until May 1, 1956; that while in such employment Jones had no patents, made no assignments of any inventions or devices to the Hallo-Dyfalu Corporation, and, in fact, made no inventions. Under bailment, therefore, failed to establish that the item in question possessed no real value - that is if it is appreciated nothing further than services that had been rendered for wages, the value of which, if any, could be measured in some other manner. Their testimony together with proof of what the item could have made and a prima facie case for unjust enrichment sufficient to justify the finding with respect thereto and the receiver in the absence of any testimony on the part of appellant to rebut such proof.

It is argued by appellant that [illegible] evidence of any other proof as to what the items consisted of on May 1, 1956, unjust enrichment failed to prove its case. Unjust enrichment was not required to make proof of it, [illegible] to which consisted on that date or the nature of [illegible] other proof was [illegible] compensation [illegible] obtain [illegible] of the value expressed in the balance sheet, but not [illegible] evidence [illegible]. In our opinion when [illegible] proof [illegible] of [illegible] in the [illegible] tion of over [illegible] received [illegible] it is [illegible] that there was a [illegible] [illegible] other items so [illegible] such sufficiency. In the absence of [illegible] proof [illegible] matter was [illegible] in finding [illegible] item in question that the value [illegible] not on the date of the contract [illegible] amount [illegible] of which the item in question consisted [illegible] of value up to the end of the employment of Fenwy [illegible].

which continued for nearly a year in one case and more than a year in the other after May 7, 1927, (the date of the contract) then they certainly could not be said to have possessed any value on that date.

It is urged that cross-complainant did not elect to have the $15,000 returned to it in accordance with paragraph 7. It is sufficient to say that the mere fact that it did not avail itself of the option to purchase within the time prescribed therefor was sufficient evidence of an election not to exercise it. The contract provided for no specific notice or other form of election. Nor was cross-complainant's right under the contract to the return of the deposit affected by its delay to make a formal demand therefor until some days later. The dec ee will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

which continued for nearly a year in one case and more than a year in the other after May 7, 1947, (the date of the contract) then they certainly could not be said to have prescribed on that date.

It is urged that cross-complainants did not elect to leave the $18,[illegible] returned to it as cross-complainant [illegible] paragraph 7. It is sufficient to say that the mere fact that it did not avail itself of the option to purchase within the time provided therefor was sufficient evidence of an election not to exercise it. The contract provided for no specific notice or otherwise of election. Nor was cross-complainant's right under the contract to the return of the deposit affected by its delay to make a formal demand therefor until some days later. The one as well as the other [illegible]

AFFIRMED.

Conklin and Crosby, J.J., concur.

33581

SAM ROSENBERG et al.,
Appellees,

v.

ZURICH GENERAL ACCIDENT
& LIABILITY INSURANCE
COMPANY, Ltd.,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

255 I.A. 615

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendant for $41,911, the amount with interest for which plaintiff was insured by defendant against loss of merchandise by burglary. The declaration counted on liability under the policy for the full amount of the insurance. No question is raised as to such amount if there was liability under the terms of the policy. The main defense and the only argument on this appeal is that the alleged burglary did not occur in such a manner as rendered defendant liable under the terms of the policy.

Under the heading "Definitions" of the policy in question the following was provided:

> "A. 'Burglary' as used in this policy shall mean a felonious and forcible abstraction by burglars of property insured under this policy from within the premises described in item 3 of the Declaration, after entry into such premises by burglars has been effected by the use of tools, explosives, electricity or chemicals directly upon the exterior thereof."

With the exception of a claim of error in excluding from evidence a certain document, hereinafter referred to, appellant's argument is confined to the single contention that the verdict and judgment were against the clear and manifest weight of the evidence

33881

SAN MORENGUEO et al.,
Appellees,

v.

SUNION GENERAL ACCIDENT
& LIABILITY INSURANCE
COMPANY, Ltd.,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

535 I.A. 015

MR. PRESIDING JUSTICE BURKE
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment against defendant for $41,911, the amount with interest for which plaintiff was insured by defendant against loss or reimbursible by burglary. The declaration counted on liability under the policy for the full amount of the insurance. No question is raised as to such amount if there was liability under the terms of the policy. The main defense and the only argument on this appeal is that the alleged burglary did not occur in such a manner as rendered defendant liable under the terms of the policy.

Under the heading "Definitions" of the policy in question the following was provided:

> "A. 'Burglary' as used in this policy shall mean a felonious and forcible abstraction by burglars of property insured under this policy from within the premises described in item 3 of the Declaration, after entry into such premises by burglars has been effected by the use of tools, explosive s, electricity or chemicals directly upon the exterior thereof."

With the exception of a claim of error in admitting from evidence a certain document, hereinafter referred to, appellant's argument is confined to the single contention that the verdict and judgment were against the clear and manifest weight of the evidence

in that plaintiffs failed to establish by a preponderance of the evidence that tools, etc., as referred to in said definition of burglary, had been directly used upon the exterior of the premises. The contention is that the provision referred to is unambiguous and to establish liability calls for proof of visible marks by the use of tools, etc., in effecting entry into the premises. As there is no contention of the use of explosives, electricity or chemicals the question is whether entry to the premises was effected by the use of a tool or tools upon the exterior thereof.

The evidence adduced by plaintiffs on that subject was given by one of the plaintiffs, A. P. Rosenberg and his nephew, Joseph Rosenberg, the last persons to close the store at about 7:30 p. m., the night before the alleged burglary, and who returned to the same about 2:45 the next morning on receiving notice of the burglary a little over an hour thereafter, and a carpenter who the afternoon of the same day repaired the door by which entrance was claimed to have been effected, and which the evidence tended to show was not changed in its exterior appearance in the interim.

The door in question opened inwards to said premises from a lobby of the building. It was connected with a burglar alarm so that on opening it the alarm was conveyed at once to the Illinois District Telegraph Company several blocks away. On receiving that alarm its nearest branch office was notified and a "runner" therefrom immediately went to the premises in question. The door was found to have been forced open in such a manner that the frame work and jamb alongside the door were pulled completely away from the wall. The bolt of one of two Yale locks thereon was protruding and had pulled away with it not only the frame work, which was hanging from the bell wire, but also the metal receptacle into which the bolt fitted. The receptacle was lying on the floor. The door was

in that plaintiffs failed to establish by a preponderance of the evidence that tools, etc., as referred to in said definition of burglary, had been directly used upon the exterior of the premises.

The contention is that the provision referred to is unconstitutional and in actual liability only for proof of visible marks by the use of tools, etc., in effecting entry into the premises. There is no consideration of the use of explosives, electricity or chemicals the question is whether entry to the premises was effected by the use of a tool or tools upon the exterior thereof.

The evidence adduced by plaintiffs on this subject was given by one of the plaintiffs, A. P. Rosenberg and his nephew, Joseph Rosenberg, the last-persons to close the store at about 7:30 p. m., the night before the alleged burglary, and who returned to the same about 8:45 the next morning on receiving notice of the burglary a little over an hour thereafter, and a computer was the afternoon of the same day replaced the door by which entrance was claimed to have been effected, and which the evidence tended to show was not changed in the delayed appearance in the interim.

The door in question opened inwards to such premises from a lobby of the building. It was constructed with a burglar alarm so that on opening it the alarm was conveyed as usual to the Illinois District Telegraph Company several blocks away. On receiving that alarm the nearest branch office was reached and "runner" therefrom immediately went to the premises in question. The door was found to have been forced open in such a manner that the frame was pushed along showing the door was pulled completely away from the jamb. The bolt of one of two Yale locks thereon was protruding and had pulled away with it not only the frame work, which was coming from the wall also, but also the metal receptacle into which the bolt fitted. The receptacle was lying on the floor. The door was

pushed out of shape and could not be closed.

Joseph Rosenberg testified that he saw marks between the two locks, depressions; that they were cuts about an inch and a half in width and may be a sixteenth of an inch deep, more like a bite in the wood than a break; that these marks were alongside the locks of the door on the outside and had the appearance as if something had been pushed in there and pried over. The door was made of heavy, solid wood about three inches thick. He also testified that on the outside of the door about four and one-half or five feet from its base there was a mark about four and one-half or five inches in diameter "alongside of the part that opens up, above the bolt" which he described as having the appearance of a large sized indoor ball having been thrown against a wall that was wet. These marks were described as fresh and as not having been there before the store was closed up the previous evening.

A. P. Rosenberg testified "there were two locks on the door about six or seven inches apart and between these two locks there were marks from some instrument pressing against it, pressing against the side of the molding. Those marks had not been there before that time." As tending to impeach the Rosenbergs, there was introduced in evidence a written statement prepared the next morning by one Carentz, an investigator for defendant. The statement purported to be one by Joseph Rosenberg but was signed by him and A. P. Rosenberg. It gave an account of their closing the store the previous evening, of testing and having the alarm set in order, of having telephoned about the burglary and of their returning to the premises and discovery of the conditions there. In it was the statement, "there are no jimmy marks on outside of the door, or any other marks. It is the opinion of the police that door was broken open

pushed out of shape and could not be closed.

Joseph Rosenberg testified that on his return with the two locks, deponent's that they were onto about [illegible] inch and a half in width and may be a sixteenth of an inch deep, more like a groove in the wood than a break; that there were [illegible] the locks of the door on the outside and had the appearance as if something had been pushed in there and pulled over. The door was made of heavy, solid wood about three inches thick. He also testified that on the outside of the door about four and one-half or five feet from the base there was a mark about four and one-half or five inches in diameter "[illegible] of the part that opens up, above the bolt" which he described as having the appearance of a large [illegible] indoor bell having been thrown against it, as well that was not. Those marks were described as fresh and as not having been there before the door was closed up the previous evening.

A. P. Rosenberg testified "There were two locks on the door about six or seven inches apart and between these two locks there were marks from some implement pressed against, pressing against the side of the molding. Those marks had not been there before that time." In testing to [illegible] Mr. Rosenberg, there was introduced in evidence a [illegible] statement [illegible] morning by one Carmen, an investigator for defendants. The statement purported to be one by Joseph Rosenberg but [illegible] by him and as to [illegible]. It gave an account of their [illegible] the previous evening, of [illegible] and Davis. The claim [illegible] of having [illegible] about the [illegible] and [illegible] premises and discovery of the [illegible] there. [illegible] said, "There are no [illegible] marks on outside of the door [illegible] marks. It is the opinion of the [illegible] that door [illegible]

by some person pushing on door from outside." A. P. Rosenberg, when examined with regard to the statement, said that he called Carentz's attention to the same and that he said, "it is right if the door is broke, it don't make any difference." This was denied, however, by Carentz.

Johnson, the carpenter who was sent by the building authorities to repair the door, testified: "The front was marked like they had used some kind of bar or something on the door. It was marked in the door and the jamb, too. I had to put it all back and smooth it off. I had to smooth the door off a little where the worst mars were and then I had to stain it afterwards. Those marks looked like the marks of a bar up against the door and on the jamb. * * * There was one big mark and several smaller marks. The big mark was just about right in between the two locks. It was a mark there, right into the jamb. The jamb of the door had a mark in from behind, from a kind of bar or jimmy, or something. * * * The mark was about one-sixteenth or one-eight of an inch in the door and jamb there."

Damage to the interior of the door frame is admitted by appellant. Reliance, however, is placed upon the testimony of eleven policemen, who came to the scene shortly after discovery of the conditions, and that of said Carentz, and Venash, auditor of defendant, tending to show that there were not any marks on the outside of the door indicating the use of an instrument or tool.

We shall not undertake to repeat all defendants' witnesses testified to upon said subject. In the main the testimony bearing upon it was of a negative character, such as the witnesses did not see any marks on the outside of the door nor any depressions as though made by an instrument; that it was their opinion that the door had been forced open from the outside by crowding it. The value of their testimony on this point would depend largely on the

by some person pushing on door from outside." [illegible] cooperated, when examined with regard to the statement, said [illegible] Garnett's attention to the case and that he said, "It is right if the door is broken, it doesn't make any difference." This was denied, however, by Garnett.

Johnson, the carpenter who was sent by the building authorities to repair the door, testified: "The front was marked like they had used some kind of bar or something on the door. It was marked in the door and the jamb, too. I had to put it all back and smooth it off. I had to smooth the bar off a little where the marks were and then I had to finish it differently. These marks looked like the marks of a bar up against the door on the jamb. * * * There was one big mark and several smaller marks. The big mark was just about right in between the two locks. It was a mark there, right into the jamb. The jamb of the door had a mark in from behind, from a bar or jimmy, or something. The mark was about one-sixteenth or more in the door and jamb there."

Damage to the interior of the door frame is admitted by appellant. Evidence, however, is placed upon the testimony of eleven policemen, who came to the scene shortly after the entry of the conditions, and to a of said officers, and [illegible] of defendant, tending to show that [illegible] side of the door indicating the use of an instrument [illegible].

We shall not undertake to review or reconcile [illegible] manner in which to open well-[illegible]. In the main [illegible] bearing upon it was of a very [illegible], which [illegible] did not see any marks on the overall of the door [illegible] as though made by an instrument; that [illegible] door had been forced open from the outside by prying [illegible]. The value of their testimony on this point would depend largely on the

thoroughness of their examination, and to some extent as to the probability of their making such a close inspection as to discover such marks when they were also investigating the several evidences of a burglary, including those shown on a basement window and on a door leading from the outside of the building to the lobby, and the general conditions of disorder. It is hardly probable that the policemen made an examination with reference to determining liability under the policy. The value of their testimony was somewhat shaken by cross-examination as to the extent of their investigations of the premises and the conditions there found and the time they took for making them. And the testimony of defendants' two employes might from their interest be regarded as somewhat biased, thus leaving all of the testimony on the subject for the credibility of the jury. It is fundamental that the weight of the evidence is not to be determined by the number of witnesses testifying one way or the other, and that even though the evidence be such as to leave this court in doubt, the verdict will not be disturbed unless it can say that it was manifestly against the weight of the evidence. We are not prepared so to do, and that is the only question, except as to the rejection of certain evidence, that appellant argues on this appeal. If the proof of the exterior condition of the door depended on the testimony of the Rosenbergs alone we might hesitate, in view of their signed statement with regard thereto, to affirm the judgment. But the record reveals no interest or motive on the part of the carpenter who repaired the door to give false testimony with regard thereto. There was no attempt to impeach him for want of veracity or personal integrity. He was afforded an opportunity for a more critical examination of the door than the policemen had under artificial light and all of the circumstances of the time and place that called for more specific attention on their part. The marks, as testified to, were slight

thoroughness of their examination, and to some extent as to the probability of their making such a close inspection as to discover such marks when they were also investigating the several evidences of a burglary, including those shown on a basement window and on a door leading from the outside of the building to the lobby, and the general conditions of disorder. It is highly probable that the policemen made an examination with reference to determining liability under the policy. The value of their testimony was somewhat shaken by cross-examination as to the extent of their investigations of the premises and the conditions there found and the time they took for making them. And the testimony of defendants' two employees might from their interest be regarded as somewhat biased, thus leaving all of the testimony on the subject for the credibility of the jury. It is fundamental that the weight of the evidence is not to be determined by the number of witnesses testifying one way or the other, and that even though the evidence be such as to leave this court in doubt, the verdict will not be disturbed unless it can say that it was manifestly against the weight of the evidence. [illegible] as to [illegible], and that is the only [illegible], except as to the rejection of certain evidence, that appellant argues on this appeal. If the proof of the exterior conditions of the door depended on the testimony of the insurance people we might hesitate. In view of their sworn statement with regard thereto, to which the jury, and the court, [illegible] no interest or motive on the part of the [illegible] who refused the door to give false testimony with regard thereto. There was no attempt to impeach him for want of veracity or general integrity. He was afforded an opportunity for a more critical examination of the door than the policemen had under artificial light and all of the circumstances of the time and place that called for more exacting attention on their part. The marks, as testified to, were slight

at best. But if there were any at all, however slight, indicating use of a tool to effect entrance through the door liability would attach under the clause in question.

Much of the testimony introduced was of a character to raise suspicion as to whether it was not a "fake burglary." That phase of the testimony is not argued in appellant's brief. To review it would only lead into the realm of speculation. It afforded, perhaps, grounds for varying views. If that phase of the question was argued to the jury their finding nevertheless was to the effect that there was a burglary and that the premises were entered by the door in question through the use of some tool which left marks on the outside thereof in successfully opening it, and there was adequate testimony to support such a verdict.

During the cross-examination of Joseph Rosenberg he identified the written document referred to and admitted knowing that it contained the statement that there were no jimmy or other marks on the outside of the door, but which he explained as aforesaid. Defendant then offered the document in evidence, although the time had not arrived for it to put in its case and it might properly have been rejected for that reason. Plaintiff interposed no objection ~~except~~ and that it contained the opinion of the police as to how the premises were entered. As, however, the purpose of its introduction was merely to show the admission that there were no jimmy or other marks on the outside of the door, and the witness, Joseph Rosenberg, had admitted that he signed the statement with those words in it, the court thought there was no reason why the document itself should be received in evidence. While we think it was admissible if offered at the proper time, yet in view of the fact that the jury had the full effect of it in said admission, to which the document itself could have added nothing, we do not think it was reversible error to refuse the offer of it in evidence.

at boat. But if there were any at all, however slight, indicating use of a leak as effect evidence although the poor liability would affect under one clause in question.

Upon of the 6 alibiny indicated was of a character to raise suspicion as to whether it was not a "fair weather" case. The phase of the testimony is not argued in appellant's brief. To review it would only lead into the realm of speculation. It suffices, perhaps, to quote for varying views. If that phase of the question was argued in the jury room, finding verdict, the question as to the effect was a jury's by and that the evidence was weighed by the jury in question in the case. If there was a jury's verdict, the court was adequate testimony to support such a verdict.

During the cross-examination of Joseph Cunningham he identified the written statement in the trial court, which it contains the following: "Have you ever in jimmy or other matter or the records of the court, one which is explained as "Tree-mail." Informed also officers the document in evidence, although the time has not arrived for it to be put in the case or in right properly here being relative or, at most remote. Counsel interposes as objection, stated in a conclusion the opinion of the witness as to how the document was in fact. He, moreover, his purpose of its introduction was merely to show the conversation in which there were no jimmy or other marks on the exterior of the door, and in answer, Joseph Cunningham, has stated that he talked the afternoon with those works in it; the court thought there was no [illegible] document itself should be shown in evidence. While it under is was [illegible] is effect of the [illegible], but is when of the that when the jury has [illegible] of it is a [illegible], so what the document itself could have [illegible] machine, [illegible] it was [illegible] [illegible] the [illegible] evidence.

Following the long established rule that we will not reverse on the weight of the evidence unless the verdict is clearly and manifestly against it we will affirm the judgment.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

Following the long established rule that we will not review on the weight of the evidence unless the verdict is clearly and manifestly against it we will affirm the judgment.

AFFIRMED.

Hamlin and Oakley, J.J., concur.

32a

33590

255 Ill. 615

PEOPLE OF THE STATE OF ILLINOIS ex rel., BENJAMIN M. JACOBSON, Appellee, v. CITY OF CHICAGO, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

In this case the city appeals from an order for a writ of mandamus commanding it to issue forthwith to the relator an auctioneer's license for 426 South State street, Chicago, for the year 1929.

The issues formed by the pleadings and the evidence thereunder present as the main question whether there was an abuse of discretion on the part of the mayor in denying relator's application for a license as auctioneer at said place for the year 1929.

Under the ordinances all licenses for auctioneers expire on the 31st day of December of the year in which they are granted. By such provision relator's license for the year 1928 expired on the 31st of December of that year. It appears that it was also revoked on the same day on the recommendation of the Commissioner of Police.

The application refused was made for the year 1929, on February 2, 1929. These facts are set up in the petition for the writ together with certain provisions of the ordinances relating to the subject.

33590

PROOFS OF THE WILL OF
ILLINOIS ex rel.,
BENJAMIN B. LOGGINS,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

Mr. Justice Jerome Green
DELIVERED THE OPINION OF THE COURT.

In this case the city appeals from an order for a writ of mandamus commanding it to issue certificate to the relator an amusement's license for the year 1929.

The issues formed by the pleadings and the evidence thereunder present as the main question whether there was an abuse of discretion on the part of the mayor in denying relator's application for a license as amusement at such place for the year 1929.

Under the ordinances all licenses for amusements expire on the last day of December of the year in which they are granted. By such provision relator's license for the year 1928 expired on the last of December of that year. It appears that it was also revoked on the same day on the recommendation of the commissioner of police.

The application refused was made for the year 1929, on February 8, 1929. There have been no by-laws passed for the exit together with certain provisions of the ordinances relating to the subject.

The notice given by the mayor of the revocation of relator's license for the year 1928, stated that it was done on the recommendation of the commissioner of police and that no license would be issued or transferred to relator or any other person at that place or to relator at any address in the city.

The ordinance provides that such a license may be revoked upon written notice by the mayor "whenever it shall appear to his satisfaction that the licensee has violated any of the provisions of this chapter or of any other ordinance of the City of Chicago relating to auctions and auctioneers," and that the mayor shall have power to forthwith revoke any such license upon report, by the superintendent of police, that an auctioneer has violated any of the provisions of the ordinance.

The court might well have dismissed the petition for insufficiency, it not negativing the existence of grounds for the revocation. However, defendant made answer denying among other things that petitioner complied with all the requirements of the ordinances relating to the business and averring in effect that the refusal to grant petitioner a license was in accordance with the ordinances under provisions set forth.

Among the provisions of the ordinances cited in the answer is that "all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance and as the mayor in his <u>discretion</u> shall deem suitable and proper persons to be licensed," and the provision that "if at any time after the granting of any license any department head shall certify to the mayor that the licensee is violating any of the ordinances of the City of Chicago or any of the statutes of the State of Illinois in the conduct of his business, the mayor shall have the power to revoke the license therefor."

The notice given by the mayor of the revocation of relator's license for the year 1932, stated that it was done on the recommendation of the commissioner of police and that no license would be issued or transferred to relator or any other person at that place or to relator at any address in the city.

The ordinance provides that such a license may be revoked upon written notice by the mayor "whenever it shall appear to his satisfaction that the licensee has violated any of the provisions of this chapter or of any other ordinance of the City of Chicago relating to auctions and auctioneers," and that the mayor shall have power to forthwith revoke any such license upon report, by the superintendent of police, that an auctioneer has violated any of the provisions of the ordinance.

The court might well have dismissed the petition for insufficiency, it not negativing the existence of grounds for the revocation. However, defendant made manifest during among other things that petitioner complied with all the requirements of the ordinances relating to the business and averring in effect that the refusal to grant petitioner a license was in accordance with the ordinances under provisions set forth.

Among the provisions of the ordinances cited in the answer is that "all licenses shall be issued to such person or persons as shall comply in all respects with the provisions of this ordinance and as the mayor in his discretion shall deem suitable and proper persons to be licensed," and the provisions that "if at any time after the granting of any license any department head shall certify to the mayor that the licensee is violating any of the ordinances of the City of Chicago or any of the statutes of the State of Illinois in the conduct of his business, the mayor shall have the power to revoke the license therefor."

In his replication petitioner denied that he had violated any ordinances of the City of Chicago or any of the statutes of the state in connection with his business and averred that he had always complied with all the laws and ordinances relating to the business.

On the evidence adduced the court found the issues for the relator and ordered the writ to issue.

In substance petitioner testified that he had complied with the provisions of the ordinances and had never refused or failed to return money promptly in cases required by the ordinance and had never made any false representations as to the merchandise he sold, and testified in effect that he had never violated any of the specific provisions which under the ordinance would justify the denial of a license or its revocation, and explained the methods of his business.

The defense called one Szold, a representative of the Chicago Better Business Bureau, who visited relator's auction place on December 13, 1928, apparently to investigate the way he conducted auctions. His testimony was to the effect that he asked him to put up a manicure set which the relator described as "made of surgical steel, with handles of amber and pearl," which was sold for $3.50, and that he bid in one like it for the same amount, and also bid in a piece of cloth described as a Persian prayer shawl "imported and made of silk and linen;" that it was auctioned for $6.00, and "another prayer shawl" was bid in by the witness at the same price. A chemist was called as a witness who stated that he had analyzed the steel in the manicure set and that it indicated a rather low grade of steel, very similar to nails; that it was not surgical steel - that it was not steel at all. Another chemist testified that he separated the warp from the threads of the shawl and made a microscopic and chemical examination of it and was of the opinion that it was made out of cotton and artificial silk, rayon; that

In his rehabilitation petitions counsel that he had violated any ordinances of the City of Chicago or any of the statutes of the state in connection with his business and further that he had always complied with all the laws and ordinances relating to the business.

In the evidence adduced the court found the issues for the relator and ordered the writ to issue.

In endeavoring petitioner justified that he had complied with the provisions of the ordinance and had never refused or failed to return money promptly in cases required by the ordinance and had never made any false representations or to the contrary, be said, and justified in effect that he had never violated any of the specific provisions which under the ordinance could justify the denial of a license or its revocation, and explained the methods of his business.

The defense called one [illegible], a representative of the Chicago Better Business Bureau, who testified that "another place on December 14, 1938, particularly in November [illegible] complaints. The testimony was to the effect that he made it to put up a manicure set which the relator manufacture made of surgical steel, with handles of amber and pearl," which was sold for $3.50, and that he did in one line in for a [illegible] account, and he did in a place of cloth [illegible] or a [illegible] "imported" [illegible] made of silk and linen; that in [illegible] $6.00, and "another purser [illegible]" was sold in by the [illegible] in the same price. A chemist was called as a witness who stated that he had analyzed the steel in the manicure set and that it [illegible] grade of steel, very similar to [illegible] steel - that it was not stainless steel. Relator's counsel contended that he operates the shop from the standpoint of the local consumer's microscopic and chemical examination of it and [illegible] that it was made out of cotton and artificial silk, [illegible]

there was no genuine silk or genuine linen in the shawl. Two investigators from the city prosecutor's office also testified. The testimony of one of them substantially corroborated the testimony with regard to relator's representations as to the character of the imported prayer shawl and of the manicure set. His testimony also tended to show that the auctioneer pretended to receive bids on articles that were not made. The testimony of the other investigator was to the effect that one of the persons acting as an auctioneer at said place had previously pleaded guilty to running a fake auction, and represented that he was half owner in the business where the auction was conducted by relator.

The captain of police for the district in which the auction was conducted testified that the investigator from the Business Men's Association had been sent in to relator's auction shop at his request and that upon their complaints he sent a recommendation "through the proper channels" that the license be revoked and the "chief" sent that recommendation to the mayor.

The relator on cross-examination at first said he did not remember what he said the shawl was made of or that he did not say it was an imported prayer shawl or made of silk and linen. Later he admitted he said it was an imported prayer shawl. Later still he was positive he did not say the prayer shawls were silk and linen; that he did not have any recollection of telling what they were made of at the auction sale, nor of saying the manicure set was of surgical steel, and denied that he ever announced a price or bid without getting a bid.

The ordinance expressly provides that the license of an auctioneer may be revoked for false representation or statement as to the character or quality of property offered for sale. The main question is whether upon a report to the mayor of such alleged

there was no genuine silk or genuine linen in the cloth. I o investigators from the city prosecutor's office also testifi The testimony of one of these subversives corroborated the testimony with regard to vendor's representations as to the character of the imported yarns used and of the machinery. His testimony also tended to show that the auctioneer pretended to receive bids on articles that were not made. The testimony of the other investigator was to the effect that one of the persons acting as an auctioneer at auctions and previously pleaded guilty to running a fake auction, and represented to be a real estate in the business where the auction was conducted by vendors.

The opinion of policy for the district in which the auction was conducted testified that the investigator from the Business Bure association and been sent in to relieve's auction. They request and that upon their complaints be sent a recommendation through the proper channels" that the licenses be revoked and the "owner" sent that recommendation to the mayor.

The relator on cross-examination, I think, he did not remember what he told the board was most of or that he did not say it was an assorted payroll sheet or mechanical silk and linen. Later he admitted he said it was an imported payroll sheet. I do not recall he was positive he did not say the payroll sheets were silk and linen that he did not have any recollection of telling that they were made of all the auction sale, nor of saying the manufacture of analysis steel, nor denied that he ever announced a price or bid, nothing a bid.

The ordinance expressly provides that the license of an auctioneer may be revoked for false representation or misrepresentation as to the character or quality of property offered for sale. The main question is whether upon a report to the mayor of such alleged

false representations, as may be implied from the evidence, he abused the discretion lodged in him by the ordinance to refuse another license to relator. It is settled law in this State that to justify the granting of a writ of mandamus the relator must show, by averment and proof, a clear right to the writ, and where discretion is invested in an official his decision cannot be controlled by the writ unless it is shown that he has acted fraudulently or corruptly. Reviewing the evidence in this case we are not satisfied that the evidence offered by plaintiff establishes a clear right to the writ, or that the action of the mayor can be so characterized or constituted an abuse of discretion. The facts testified to in support of the city's answer having, as the evidence tends to show, been brought to the attention of the mayor he might well deem the relator not a suitable and proper person to be licensed and in the exercise of a sound discretion have refused the application. Being empowered to revoke the former license for fraudulent conduct in the misrepresentation of the character of the articles sold at auction, he was justified in refusing to issue another license to the same party. The object of the regulation of auctions and auctioneers by ordinance is to promote the general welfare by protecting the public from fraudulent sales. (City of Chicago v. Ornstein, 323 Ill. 268.) We cannot lightly interfere with the exercise of discretion lodged in the mayor to refuse applications by persons not deemed "suitable and proper persons to be licensed" and thus to protect the public welfare, where the facts are insufficient to show an abuse of his discretion.

The order for the writ will be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Scanlan and Gridley, J., concur.

false representations, or may be implied from the circumstances, he abused the discretion lodged in him by the statutes in a case where another license to relator. It is settled law in this state that to justify the granting of a writ of mandamus the relator must show, by argument and proof, a clear right to the writ, and that the public is interested in an official act which cannot be completed by the writ unless it is done such an act cannot properly or correctly. Reviewing the evidence in this case we are not satisfied that the evidence offered by plaintiff establishes a clear right to the writ, or that the action of the mayor can be characterized as constituted an abuse of discretion. The trial court in support of the city's answer having, as the evidence tends to show, been brought to the attention of the mayor on night [illegible] authorities and proper persons to be interested in the purposes of a public discretion have refused the application. Being apparently the former license for Fraternal Lodge in the mere presentation of the character of the applicant [illegible] in refusing to issue another license to the same person. In objecting to the regulation of dances and entertainments by authorities in the municipal the general welfare by prohibiting the public from frequenting [illegible] (City of Tulsa v. [illegible], [illegible]) [illegible] it being interfere with the exercise of discretion lodged in [illegible] applications by persons not [illegible] licensed and that in protect the public [illegible] insofar (as to [illegible] of the discretion.

The order [illegible] of facts.

REVERSED WITH [illegible] of [illegible].

[illegible] and [illegible] concur.

33590

FINDING OF FACTS.

We find that relator made false representations as to the character and quality of property he offered for sale as auctioneer and that the mayor did not abuse his discretion in refusing his application for another license.

38890

Effects of Action.

It was that reflection made Cohen reputation-timer as to the character and quality of property he offered for sale as auctioneer and also the mayor at was shown his discretion in refusing his application for another license.

33a

255 I.A. 615

33599

CELLE BECKER,
Appellee,

v.

ALFON E. BAHR,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for rent for the month of May, 1928, under a lease from plaintiff to defendant. The lease was for an apartment in a three-story building for a period of two years from May 1, 1927. Plaintiff introduced said lease and evidence tending to show that she occupied one of the apartments as her home, and rested. Defendant introduced a certified copy of a judgment of the Municipal Court for $700 and costs against plaintiff, proof that the premises were sold under an execution issued upon the judgment and levied on said premises, that a bailiff's deed of the entire premises was issued to one Bertha F. Hooper, and that she quitclaimed her title to her husband, James H. Hooper; that thereafter on being shown said deeds defendant paid said James H. Hooper the rent for the month of May, 1928, herein sued for, on his demand therefor after producing the said two deeds.

Defendant also introduced in evidence the record of a bill of complaint filed by plaintiff against James H. Hooper prior to the issuance of the bailiff's deed, to restrain its issuance and have the certificate of sale declared null and void, among other reasons because as alleged therein plaintiff's homestead was not set-off, and the property was bid in for less than $1,000. Defendant also intro-

33898

CHLIX BROWN,
Appellee,

v.

ALFRED E. BAER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE DONAHUE
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for rent for the month of May, 1932, under a lease from plaintiff to defendant. The lease was for an apartment in a three-story building for a period of two years from May 1, 1927. Plaintiff introduced said lease and evidence tending to show that she complied one of the apartments as her home, and rested. Defendant introduced a certified copy of a judgment of the Municipal Court for (?) and costs against plaintiff, proof that the premises were sold under an execution issued upon the judgment and levied on said premises, that a certificate of sale of the entire premises was issued to one Martha [illegible] Hooper, who then quitclaimed her title to her husband, James H. Hooper; that thereafter on being shown said deed defendant said and James H. Hooper the rent for the month of May, 1932. Herein sued for, on his demand therefor after producing the said two deeds.

Defendant also introduced in evidence the record of a suit of complaint filed by plaintiff against James H. Hooper prior to the issuance of the sheriff's deed, to restrain the issuance and have the certificate of sale declared null and void, among other reasons because as alleged therein plaintiff's husband was not [illegible], and the property was sold in for less than [illegible]. Defendant also intro-

duced the decree dismissing said bill for want of equity.

Appellee has filed no brief. It is said in appellant's brief that the court apparently decided the case upon the theory that the bailiff's deed was void by reason of plaintiff having a homestead estate in the property. We fail to see that any such question is presented in the record. For aught that appears to the contrary, plaintiff's homestead rights may have been set-off or satisfied.

If the court's decision was based upon the general rule that a tenant is estopped to deny the title of his landlord as it existed in him at the time of the creation of the tenancy, the court erred. While a tenant cannot deny his landlord's title he may, however, show that the title of his landlord has been divested by operation of law. (Spafford v. Hedges, 231 Ill. 140, 145, and cases there cited.) And one of the methods by which he may show it has been divested by operation of law is by an execution sale. (Corrigan et al. v. City of Chicago et al., 144 Ill. 537,547; Franklin v. Palmer et al., 50 id. 202, 206; Supervisors v. Herrington, 50 id. 232; Tilghman v. Little, 13 id. 240, 35 C. J. 1244.) In the Tilghman case, supra, the court said that where the estate is vested in a third person by operation of law the tenant holds possession subject to the title of such person, that the relation of landlord and tenant becomes dissolved, and the latter no longer holds the premises under the former. (p. 242)

That under these authorities defendant had the right to attorn to the holder of title under the bailiff's deed as the true owner cannot be questioned. It follows, therefore, that plaintiff had no right of action against him after he had so attorned. Accordingly the judgment must be reversed as a matter of law. REVERSED.

Scanlan and Gridley, JJ., concur.

based the decree dismissing said bill for want of equity.

Appellee has filed no brief. It is said in appellant's brief that the court apparently decided the case upon the theory that the bailiff's deed was void by reason of plaintiff having a homestead estate in the property. We fail to see that any such question is presented in the record. For aught that appears to the contrary, plaintiff's homestead rights may have been set-off or satisfied.

If the court's decision was based upon the general rule that a tenant is estopped to deny the title of his landlord as it existed in him at the time of the creation of the tenancy, the court erred. While a tenant cannot deny his landlord's title he may, however, show that the title of his landlord has been divested by operation of law. (Spellman v. Kadzus, 231 Ill. 160, 165, and cases there cited.) And one of the methods by which he may show it has been divested by operation of law is by an execution sale. (Gorham et al. v. City of Chicago et al., 144 Ill. 337,347; Franklin v. Palmer et al., 30 Id. 304, 306; Henderson v. Herrington, 50 Id. 228; Tillman v. Little, 13 Id. 40, 50 C. J. 1. 1844.) In the Tillman case, supra, the court said that where the estate is vested in a third person by operation of law the tenant holds possession subject to the title of such person, that the relation of landlord and tenant becomes dissolved, and the latter no longer holds the premises under the former. Id. 1844)

That under those authorities defendant had the right to attorn to the holder of title under the bailiff's deed as the true owner cannot be questioned. It follows, therefore, that plaintiff had no rights of action against him after he had so attorned. Accordingly the judgment must be reversed as a matter of law.

REVERSED.

Leaman and Dryfoy, JJ., concur.

33617

S. BAER,
Appellee,

v.

METROPOLITAN PETROLEUM COMPANY, a corporation, and NAT RUE,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order overruling a motion of appellants to vacate the judgment entered by confession upon the warrant of attorney contained in a judgment note for $562.50.

From the verified petitions it appears that the Metropolitan Petroleum Company, a corporation, had become involved in certain complaints made before the Illinois Securities Commission, and that said commission had advised the corporation that unless it made settlement with J. L. Herman, the payee of the note, the commission would not dismiss the proceedings, and that thereupon Izrael D. Zimmerman, president of the corporation, and Nat Rue, its secretary, took back certain certificates of stock involved in said complaints aggregating the sum of $1500, and executed the note in question and two others for $500 each, to the order of said Herman, in the name of the corporation, and adding thereto their own signatures.

The note in question was endorsed by said Herman to plaintiff Baert

The petition of appellants charges that Baer had knowledge of the facts that transpired at the time of the execution of the notes; that Herman received no consideration for the assignment to Baer; that the notes were signed under coercion, pressure and duress of said commission by which said Zimmerman and Rue agreed on behalf

SUIT

D. HAER,

Appellee,

v.

METROPOLITAN PETROLEUM
COMPANY, a corporation,
and NAT HAM,
Appellants.

APPEAL from CHICAGO.

HONT. DE CHICOM.

MR. PRESIDING JUSTICE BURKS

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order overruling a motion of appellants to vacate the judgment entered by confession upon the warrant of attorney contained in a judgment note for $582.00.

From the verified petitions it appears that the Metropolitan Petroleum Company, a corporation, had become involved in certain complaints made before the Illinois Securities Commission, and that said commission had advised the corporation that unless it made settlement with J. L. Herman, the payee of the note, the commission would not dismiss the proceedings, and that thereupon Israel D. Sherman, president of the corporation, and Nat Ham, its secretary, took back certain certificates of stock issued in said complaints aggregating the sum of $1500, and executed the note in question and two others for $800 each, to the order of said Herman, in the name of the corporation, and adding thereto their own signatures.

The note in question was endorsed by said Herman to plaintiff Baer.

The petition of appellants charges that Baer had knowledge of the facts that transpired at the time of the execution of the notes; that Herman received no consideration for the assignment to Baer; that the notes were signed under coercion, duresse and duress of said commission by which said Sherman and Ham agreed on behalf

of the corporation to take back Herman's certificates of stock and execute the three said promissory notes; that they refused to sign the notes as co-makers; that they signed them in their official capacity and not as individuals; that the obligation assumed the notes were to be a corporation obligation; that there was no other consideration therefor moving either to the corporation or to its president or to its secretary either individually or in their official capacity, and that they had no authority to enter into an agreement to give the power of attorney to confess judgment against the corporation; that its board of directors never gave them authority to execute judgment notes; that their agreement to buy back the stock with said notes was without authority; that the corporation was bordering on insolvency and that restitution to plaintiff will endanger its solvency, to the detriment of its creditors, and that about four months after the execution of the notes the board of directors of the corporation repudiated the transaction entered into with said Herman, as aforesaid.

Our attention is called to the fact that a case brought by this same plaintiff against these same defendants came up on appeal to this court in case No. 33349, which was a suit upon one of the other notes. In that case the same proceedings were had in the court below as in the case at bar - a judgment by confession, a motion to vacate the same, and an order overruling the motion, from which an appeal was prayed. The petition to vacate in that case was based upon the same grounds and allegations as contained in the petition in the instant case, and the same points were made on the appeal. It was there held that the note on its face shows that Nat Rue signed in his individual capacity only and not as an officer of the corporation; that his undertaking was absolute, and that oral testimony would not be admissible to show that he did not intend to incur a personal liability, citing Hypes v. Griffin, 89 Ill. 134;

of the corporation to take that [illegible] of [illegible] and execute the three gold promissory notes [illegible] refused to sign the notes as co-makers; that they signed them in their official capacity and not individually; that [illegible] said notes were not to be a corporation [illegible] that there was no other consideration therefor moving either to the corporation or to its president or to its stockholders individually or in their official capacity, [illegible] had no authority to bind [illegible] into an agreement to give the power of attorney to confess judgment against the corporation; that the board of directors never gave them authority by express [illegible] such [illegible] agreement to buy back the stock; that to make was without [illegible] and the corporation was acting in insolvency and that [illegible] to plaintiff's [illegible] creditors, [illegible] the execution of the notes [illegible] the corporation [illegible] the transaction [illegible].

Our attention is called to the fact that a case involving by [illegible] appeared to this court in [illegible] the other [illegible] court [illegible] motion to [illegible] which an appeal was [illegible] based upon the same grounds [illegible] position in the instant case, and the [illegible] appeal. It was there held that the [illegible] the officer in his individual capacity [illegible] the corporation; that his endorsing [illegible] transaction would not be sufficient to [illegible] impose a personal liability, citing Bryce v. Phillips, [illegible]

that the facts set out in the petition showed a consideration; that from them and the circumstances said officers of the corporation signing the note had power to execute the judgment notes; that the rights of the creditors were not involved in the case; that so far as the cognovit exceeded the power granted in the warrant of attorney in agreeing that no writ of error or appeal should be prosecuted on the judgment, the point made with regard thereto had no special merit, as plaintiff was not questioning the right of defendants' appeal. Whether it appeared in that case or not it does appear here that at the time of the execution of the notes Zimmerman and Rue were not only president and secretary, respectively, of the corporation but were two of the three directors of the corporation. It can hardly be said, therefore, that the transaction having been entered into by a majority of the directors it was without authority.

It also appears that said Herman brought suit against these same defendants on the third note in which like proceedings were had as in the other case and in the case at bar. On the appeal therein, case No. 33233, the court affirmed the judgment on like grounds as stated in the opinion in the other case.

Referring to the opinions in those two cases we see no reason for repeating what was therein said upon a like state of facts as presented in the case at bar. For the reasons therein stated the judgment in the case at bar will be affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

that the facts set out in the petition showed a conspiracy; that from them and the circumstances said officers of the corporation claiming the note had power to execute the judgment notes; that the rights of the creditors were not involved; in the court; that so far as the complaint exceeded the power granted in the warrant of attorney in agreeing that it be with or upon or appeal should be presented on the judgment, the point made with regard thereto had no special merit, as plaintiff was not questioning the right of defendants' appeal.

Whether it appeared in that case or not it does appear here that at the time of the execution of the notes plaintiff and defendants were not only president and secretary, respectively, of the corporation but were two of the three directors of the corporation. It can hardly be said, therefore, that the transaction having been entered into by a majority of the directors it was without authority.

It also appears that said Hanson should not exclude those defendants on the third note in which like proceedings were had as in the other case and in the one at bar. In the appeal entitled case No. 5,555, the court affirmed the judgment on like grounds as stated in the opinion in the other case.

Referring to the opinions in those two cases, and as reason for reversing what are therein said upon a like state of facts as presented in the case at bar, we find no reason therein meeting the judgment in the case at bar will be affirmed.

AFFIRMED.

Gaulan and Grigsby, JJ., concur.

35a

33626

~~2551~~ I.A. 615

ROBERT A. UIMLEIN, Appellee,	APPEAL FROM MUNICIPAL
v.	COURT OF CHICAGO.
E. N. ASCHERMAN, M. D., Appellant.	

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Defendant herein, against whom a judgment for $132 had been entered in the Municipal court of Chicago, appeals from an order, entered on plaintiff's motion and petition, striking from the files a satisfaction piece signed in plaintiff's name by M. L. Carmody, as his attorney, acknowledging satisfaction of the judgment.

It appears from affidavits filed in behalf of both parties that said Carmody compromised the judgment on receipt of defendant's check for $100, which has been returned and never cashed.

The motion was supported by affidavits of both plaintiff and said Carmody, stating that Carmody, without consulting plaintiff and without any authority whatsoever, accepted said check for the full amount of the judgment and executed such satisfaction piece. A rule was made on defendant to answer. He filed an affidavit in which he denied that said attorney Carmody was without any such authority and alleged that he had full authority to accept said check in settlement, without setting forth any facts to support such claim.

The affidavits on both sides set forth representations made at the time of delivering the check which are wholly immaterial

39828

ROBERT A. HERRICK,
Appellee,

v.

E. E. ADERHOLD, et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCHAEFER
DELIVERED THE OPINION OF THE COURT.

Defendant herein, plaintiff, whom a judgment for $132 had been entered in the municipal court of Chicago, appeals from an order entered on plaintiff's motion and petition striking from the files a satisfaction piece filed in plaintiff's case by E. L. Carmody, an his attorney, notwithstanding satisfaction of the judgment.

It appears from affidavits filed in behalf of both parties that said Carmody compromised the judgment on receipt of defendant's check for $10, which has been cashed and never credited.

The motion was supported by affidavits of both plaintiff and said Carmody, stating on a summary hearing plaintiff and without any necessity whatsoever, [illegible] in order for the full amount of the judgment and accounts [illegible] satisfaction piece. A rule was made on defendant to answer. [illegible] in which he denied that said Attorney Carmody [illegible] such authority and alleged that he had full authority to accept said check in settlement, without acting [illegible] any force to support such claim.

The affidavits on both sides [illegible] made at the time of trial [illegible] [illegible]

if said attorney was without authority to compromise the judgment.

It was said in McClintock v. Helberg, 168 Ill. 384, that an attorney has no implied authority to compromise his client's claim; that he cannot bind his client by any act which amounts to a surrender in whole or in part, of any substantial right; that he cannot commute a debt or materially change the security which his client may have, without his consent. The court also said that where an attorney in making an agreement with the opposite party compromises a claim for less than the amount due or accepts anything other than money in payment of the claim, such party is put upon inquiry as to the attorney's authority to make such compromise or settlement, and, if he omits to make inquiry, or to demand the production of authority, he deals with the attorney at his peril. Recognizing the general rule on the subject in Miller v. Lane, 13 Ill. App. 649, it was said that to authorize the attorney to settle and discharge the debt or compromise the judgment for a less sum than the entire amount due he must be specially authorized by his client or the latter will not be bound by his acts unless subsequently ratified.

It appears that the case was submitted and heard without objection and without any other sworn testimony than "the petition and answer and affidavits and documents."

It is urged that it was error to enter the order without hearing other evidence, it being a question of fact whether Carmody had authority to make the compromise.

The record discloses no objection to such proceeding and no motion of any kind by defendant before or after the entry of the order on which to base any of his assignments of error. As no implied authority of the attorney to compromise the judgment can be inferred

it said attorney was without authority to compromise the judgment.

In was said in Mollinkrok v. Kuiper, 100 Ill. 384, that an attorney has no implied authority to compromise his client's claim; that he cannot bind his client by any act which amounts to a surrender in whole or in part of any substantial right; that he cannot commute a tort or materially change the character which his client may have, without its consent. The court also said that where an attorney is making an agreement with the opposite party compromising a claim for less than the amount due or accepts something other than money in payment of the claim, such party is put upon inquiry as to the attorney's authority to make such compromise or settlement, and, if he omits to make inquiry, it is treated the production of authority, he could rely on the attorney as his agent. Recognizing the general rule on the subject in Pilcher v. Hoffman, 13 Ill. App. 644, it was held that to authorize the attorney to settle and discharge the debt or compromise the judgment for a lesser sum than the entire amount due he must be specially authorized by the client or the latter will not be bound by his act, unless it appears usually ratified.

It appears that [illegible] subsequently [illegible] client objection and without any [illegible] to claimant than the payment and manner was [illegible] unknowingly.

It is urged that [illegible] the [illegible] witness testing other witness, is being a question of fact whether attorney had authority to make the compromise.

The court [illegible] objection [illegible] and no motion of any kind by defendant in error or after [illegible] order or which [illegible] any or his [illegible] [illegible] authority of the attorney to compromise the judgment, and as entered

from the state of facts set forth in the affidavits of either of the parties, and as plaintiff and his attorney will be presumed to know whether there was any specific authority given, and defendant set forth no state of facts in his affidavit showing such specific authority or grounds for inferring it and under the circumstances would be put upon inquiry to show Carmody's authority to compromise the judgment, his affidavit was insufficient to throw the burden of proof on plaintiff. He saw fit to submit the case entirely upon the affidavits. From them the court could reach no other conclusion.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

from the state of facts set forth in the affidavits of either of the parties, and as plaintiff's counsel in his argument will be prepared to know whether there was any specific authority given, and affidavits set forth no state of facts in his favor which showing such specific authority or proved the undertaking it and was in the circumstances would be put upon inquiry to show defendant's authority to compromise the judgment, his affidavits are insufficient to shift the burden of proof on plaintiff. He is free to rebut the prima facie presumption the affidavits. Now then the court could trench on other considerations.

ORDER.

Cameron and Grigsby, JJ., concur.

36a

33639

255 I.A. 616

HASK JACOBS,
Appellee,

v.

SADIE RUSSELL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit by attachment against defendant, a non-resident, to recover a balance of $90 alleged to be due under the terms of a written contract. The contract provided that plaintiff should furnish all labor and material "necessary" to complete "all necessary work to be done in the opening of the ground from the building at 3543 South Michigan avenue, to the main sewer in Michigan avenue, and connecting said building with said main sewer in Michigan avenue," and to furnish all necessary permits, the work to be inspected and approved by the departments of local government having jurisdiction or control over the same, all for the sum of $320, of which plaintiff was paid $230.

Plaintiff made adequate proof of complete compliance with the contract. After digging inside the lot line and rodding therefrom to the main sewer the obstruction that caused the trouble was removed and it was not necessary to open the street between the lot line and the main sewer and, therefore, not necessary to procure a permit therefor. Because of that fact appellant contends the contract was not fully performed. The mere reading of the contract should answer the point. It expressly provides only for necessary work in connecting with the main sewer, and the fact that the opening of the street for that purpose was not necessary is not

Case 9

MARK JACOBS,
Appellee,

v.

SADIE HUNGERFORD,
Appellant.

Appeal from Municipal
Court of Chicago.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit by attachment against defendant, a non-resident, to recover a balance of $90 alleged to be due under the terms of a written contract. The contract provided that plaintiff should furnish all labor and material "necessary" to complete "all necessary work to be done in the excavating of the ground from the building as seen with Michigan avenue, to the main sewer in Michigan avenue, and connecting said building with said main sewer in Michigan avenue," and to furnish all necessary permits, the work to be inspected and approved by the superintendents of local government having jurisdiction or control over the area, all for the sum of "$90," of which plaintiff was paid $60.

Plaintiff made substantial but incomplete compliance with the contract. For digging inside the lot line and making interform to the wall, under the obstruction that caused the trouble was removed and it was not necessary to open the street between the lot line and the main sewer and, in fact, not necessary to excavate a permit therefor. Because of that if or plaintiff contends the contract was not fully performed. The more reading of the contract should answer the point. It expressly provides only for necessary work in connecting with the main sewer, and the fact that the opening of the street for this purpose was not needed is not

questioned.

While in fixing a sum for the work to be performed the parties evidently contemplated that such an opening of the street might become necessary the fact that it was not necessary did not change the obligation of defendant to pay the sum as contracted for. The sum was not made conditional in case such an opening did not become necessary.

As to the points that plaintiff was not a licensed drain layer or plumber and that the work was not approved by the proper governmental authorities the records of the city department of the board of examining plumbers were introduced in evidence and show that plaintiff was duly licensed. The proof was admissible and the fact was not controverted. And while it appears that the work was inspected by an inspector for the department of sewers, it was shown that it was the custom of the department not to make any formal approval "of such small jobs."

AFFIRMED.

Scanlan and Gridley, JJ., concur.

questioned.

While in fixing a sum for the work to be performed the parties evidently contemplated that such an opening of the street might become necessary the fact that it was not necessary did not change the obligation of defendant to pay the sum as contracted for. The sum was not made conditional in case such an opening did not become necessary.

As to the points that plaintiff was not a licensed drain layer or plumber and that the work was not approved by the proper governmental authorities the records of the city department of the board of examining plumbers were introduced in evidence and show that plaintiff was duly licensed. The proof was conclusive and the fact was not controverted. And while it appears that the work was inspected by an inspector for the department of sewers, it was shown that it was the custom of the department not to make any formal approval "of such small jobs."

[illegible]

Cowles and Gridley, [illegible], counsel.

33655

JACOB GLEWITZ,
Plaintiff in Error,

v.

WESTERN MACHINE WORKS,
a corporation,
Defendant in Error.

255 I.A. 616

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a replevin suit for the recovery of possession of certain goods described in the affidavit and writ, consisting of numerous parts and pieces which defendant bought to be used in the assembling of vibrating machines.

The machines were to be manufactured by defendant for plaintiff under a verbal contract whereby plaintiff was to pay defendant therefor the shop rate for time and whatever the material cost. No question arose as to the shop time rate or the cost of material. On the basis of charges therefor it was agreed that the balance that might be owing to defendant at the time of the replevin was $3,703.15.

Plaintiff took a nonsuit and the court then assessed the damages at said amount and entered an alternative judgment that plaintiff pay defendant that sum within ten days or that a writ of *retorno habendo* issue. Plaintiff tendered the goods taken and defendant refused to accept them. Evidence was then heard as to the tender, and on defendant's entering a remittitur down to $1,000, the amount of damages named in the affidavit and the jurisdictional limit of the court, the court then entered judgment *nunc pro tunc*, in the alternative form as aforesaid, for $1,000 as

ISSUE

JACOB SILVERS,
Plaintiff in Error,

v.

WESTERN MACHINE WORKS,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

No. PRESIDING JUSTICE DARNELL.

DELIVERED THE OPINION OF THE COURT.

This was a replevin suit for the recovery of possession of certain goods described in the affidavit and writ, consisting of numerous parts and pieces which defendant bought to be used in the assembling of vibrating machines.

The machines were to be manufactured by defendant for plaintiff under a verbal contract whereby plaintiff was to pay defendant thereof the shop rate for time and material the material cost. No question arose as to the shop time rate or the cost of material. On the basis of charges therefor it was agreed that the balance that might be owing by defendant at the time of the replevin was $2,703.12.

Plaintiff took a counsel and the court when an issued the damages of said amount and entered an alternative judgment that plaintiff pay defendant that sum within ten days or that a writ of replevin issue. Plaintiff tendered the goods taken and defendant refused to accept them. Evidence was then heard as to the tender, and on defendant's entering a remittitur down to $1,000, the amount of damages named in the affidavit and the jurisdictional limit of the court, the court then entered judgment *nunc pro tunc*, in the alternative form as aforesaid, for $1,000 as

damages.

On the theory that defendant had a common law lien on the property for services rendered and materials furnished to plaintiff, appellee seeks to justify an alternative judgment under section 22 of the Replevin Act which provides: "If the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held with proper damages, within a given time, or make return of the property."

Construing said section in Lamping Bros. v. Payne, 83 Ill. 463, 466, the court said:

> "The provision applies only to cases where the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property, as against the plaintiff, only for a certain sum of money, as, where the defendant showed special property by a levy of a fi. fa. against the plaintiff, or where defendant holds the property as the property of the plaintiff, but by virtue of some lien, as carrier, warehouseman or otherwise."

As we construe the contract it was for the furnishing of completed machines on the basis of the cost of material and the usual shop rate for labor expended in making them. If so, that gave plaintiff no general property in the separable pieces purchased by defendant for use in the construction of the machines.

The property, therefore, was not held by virtue of some lien. And even if it was held for money owed by the plaintiff, yet as said in Janes v. Gilbert, 168 Ill. 627, "the statute does not say that the money must be money owed by the plaintiff, but only that it must be money for the payment of which the property was rightfully held."

These pieces were very numerous, consisting mainly of various parts purchased to be put together in assembling the machines, such as piping, plates, washers, plugs, clips, wiring,

damages.

On the theory that defendant had a common law lien on the property for services rendered and materials furnished to plaintiff, application seems to justify an alternative judgment under section 22 of the Lapsing and which provides: "If the property has been held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held with proper damages, within a given time, or make return of the property."

Concerning such action in Manning Press, v. Exton, 75 Ill. App. 492, the court said:

> "The provision applies only to cases where the general property is in the plaintiff, and the defendant shows a special property, consisting of a right to hold the property, as against the plaintiff, only for a certain sum of money, as, where the defendant obtains special property by a lien of a kind, as against the plaintiff, or where defendant holds the property as the property of the plaintiff, but by virtue of some lien, as carrier, warehouseman or the same."

In no instance the answer is was for the furnishing of completed machines on the basis of the cost of material and the usual shop rate for labor expended in making them. It is, that have plaintiff no general property in the machines since ownership by defendant for use in the manufacture of the machines.

The property, [illegible] a mere lien. And even if it [illegible] for the plaintiff, yet as held in Green v. Gilbert, [illegible] the equities here not say that the money must be [illegible] by the plaintiff, [illegible] only that it must be ready to [illegible] the property [illegible] was rightfully held.

These pieces [illegible] machines, [illegible] of various parts purchased to be put together in various lines, as machines, such as pipes, plates, [illegible], [illegible], wires,

discs, screws, rollers, pulleys, motors and many other miscellaneous parts used in assembling them into a vibrator. On the tender of them defendant found that many of the discs and pulleys had been changed in some respects and were not in the condition as when taken under the writ, and thereupon without examination of any of the other pieces and parts, refused to receive any of the articles so tendered.

While defendant was not obliged to accept property that was not in the condition as when taken on the writ it was bound to accept a proper tender of property that remained in such condition, if separable, as appears to be the case here, from the other parts so that they were in no way dependent on the others for use or value. The evidence indicates that they were staple articles that had been purchased at various stores. If they were not injured or damaged a return of such parts constituted a defense pro tanto. (Edwin v. Cox, 61 Ill. App. 567, 570; Harts v. Mendell, 26 id. 274.)

Plaintiff offered to prove the fair and reasonable value of all the goods taken on the writ and of the rejected goods and to show that the value of all the goods taken did not exceed $500, and the value of those changed, including the cost of reproduction and actual work done on them by defendant, would not exceed $100. On objection by defendant the offers were rejected. The court erred in not receiving proof of damages actually sustained, and it could not take as the measure or proof thereof the sum of $1,000, as fixed in the replevin affidavit. (Farson v. Gilbert, 85 Ill. App. 364; Peters v. Brown, 245 id. 570.)

Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan and Gridley, JJ., concur.

clocks, screws, rollers, pulleys, motors and many other miscellaneous parts used in assembling them into a vibrator. On the issues of them defendant found that many of the clocks and pulleys had been changed in some respects and were not in the condition as when taken under the writ, and thereupon at that examination of any of the other pieces and parts, refused to produce any of the articles so demanded.

While defendant was not obliged to accept property that was not in the condition as when taken on the writ it was bound to accept a proper tender of property that remained in such condition, if separable, as appears to be the case here. From the other proofs no that they were in no way responsible on the others for use or value. The evidence indicates that they were single articles that had been purchased at various times. If they were not injured or damaged a return of such parts constituted a defense pro tanto. (Adkin v. Ford, 61 Ill. App. 667, 671; Kirby v. Cowgill, 61 Ill. 274.)

Plaintiff offered to prove the fair and reasonable value of all the goods taken on the writ and of the replaced goods and to show the value of all the goods taken not replaced and the value of those changed, including the cost of repairs and usual work done on them by defendant, which was refused. The objection by defendant the offers were irrelevant. The court erred in not receiving proof of damages actually sustained, and it could not take on the memorandum or proof thereof the sum of $1,000, as fixed in the replevin affidavit. (Pearson v. Kimmel, 85 Ill. App. 164; Pierce v. Brown, 24 Ill. 274.)

Accordingly the judgment will be reversed and the cause remanded for a new trial.

Reversed and remanded.

Gaertner and Trimble, JJ., concur.

33674

255 I.A. 616

MARIAN B. JACKSON,
Appellant,

v.

JAMES P. JACKSON,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing for want of equity a bill for separate maintenance.

The parties were married in 1902, and lived, so far as the evidence shows, with apparent mutual trust and affection until shortly before the husband left the wife in July, 1927.

The bill was filed in March, 1928, and the decree was entered in May, 1929. In the meantime, correspondence and conferences looking to their reconciliation proved ineffectual and the case went to a hearing on the date of the decree.

We have to look mainly to the testimony of the parties themselves and the correspondence had between them for light upon the issues of the case.

From her testimony it appears that in February, 1927, on landing at San Francisco from a trip to Honolulu in that month she received a message from her husband that he was going to Boston about March 4th. She reached Chicago March 12th. Suspicions aroused that he did not go to Boston led to questions about it and he finally said he had met some "other woman" and wanted his wife "to let him go," but that he had done no wrong. Several conversations were had later on the subject in which she offered to help him

3507a

MARIAN B. JOHNSON,
Appellant,

v.

JAMES P. JOHNSON,
Appellee.

APPEAL FROM DIVORCE DECREE
COURT, DADE COUNTY.

Mr. Justice Terry Brown:

ON APPEAL: THE OPINION OF THE COURT.

This appeal is from a decree dismissing for want of equity a bill for separate maintenance.

The parties were married in 1934, and lived, so far as the evidence shows, with apparent mutual trust and affection until shortly before the husband left the wife in July, 1937.

The bill was filed in March, 1939, and the decree was entered in May, 1939. In the meantime, correspondence and conferences looking to their reconciliation proved ineffectual and the case went to a hearing on the date of the decree.

We have to look mainly to the testimony of the parties themselves and the correspondence had between them for light upon the issues of the case.

Tom Roe testified it appears that in February, 1937, on leaving at [illegible] Tremaine from a trip to Honolulu, in her mail she received a message from her husband that he was going to Boston about March 6th. He reached Chicago March 4th. Implications arouse that he did not go to Boston but to questions about it and he finally said he had met some "other woman" and wanted his wife "to let him go," but said he had done no wrong. Several conversations were had later on the subject in which she offered to help him.

"fight this business" and told him he could not trust the "other woman" nor "expect happiness built on broken hearts and broken homes." Thereafter he was not home much Saturdays, Sundays or evenings before he left her. To get him "away from his trouble" she tried to persuade him to take a trip with her, but he left her, as before stated, in the following July. She remained thereafter in their home apparently supported by him until the same was sold when she leased an apartment.

In October, 1928, he told her if she would make it possible for a divorce he would marry the person referred to as the "other woman." When a motion for alimony came up on February 1, 1929, he stated in open court that he wanted to take her back. Thereupon she wrote him a letter on February 4th saying that until he made that statement in open court she thought a decree was inevitable and offered him the opportunity to come back and make a new start; that she "wanted to do this," but that when he sold the home she decided it would do no good, and now his statement had changed her mind; that he could come to her apartment, the lease for which had several months to run; that she could have no piece of mind the rest of her life if she did not do all she could to give him a chance to come back, and would gladly meet him at any time and place he said, and asked him to take time and think if he wanted to come back - "to be honest with himself and with her." He answered the letter March 5, and said his offer in open court was sincere and renewed it but suggested the furniture should be removed to his home and that her apartment be sublet. On receiving his letter Friday, March 15th, she called him on the telephone and asked if he wanted to come back. He answered that he had not time to talk but would call her the next day. He called her Monday evening and said: "What do you want to see me for?" She answered that she "wanted him," and he said, "Well, I will call you up again some time." In response to such indefinite-

"fight this business' and told him he could not trust the "other woman" nor "expect happiness built on broken hearts and broken homes." Thereafter he was not home much Saturdays, and [illegible] of evenings before he left her. To get him "away from his trouble" she tried to persuade him to take a trip with her, but he left her, as before stated, in the following July. He remained thereafter in their home apparently supported by him until the same was sold when she leased an apartment.

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ness and indifference she said he could not play fast and loose with her like that.

It does not appear that they had any further conversations until the Tuesday preceding the hearing, May 7, 1929. It was had in the corridor of the court room in the presence of a lady who accompanied her on the trip to Honolulu. They all arranged to meet the next day at the Medinah Athletic Club. When they met he said that he had nothing to say - that they had invited him. Mrs. Jackson then said she had written him in good faith and wanted him to come back. She testified to the above state of facts and they were in no respect controverted.

When defendant took the witness stand his only attempt at justification was the statement that his wife had spent about a third of the time away from him in her travels, though he gave no details to substantiate that statement. On the contrary her testimony was to the effect that the trips she had taken, one to Honolulu, another to California, and a Mediterraen trip were taken within the previous eight years; that they altogether covered only a few months and all were with his assent and paid for by him. The lady who accompanied her to Honolulu testified that he expressed gladness at the trip and that it was with his consent. The only other trips testified to were yearly trips to visit her mother in Syracuse, N. Y., for about two weeks at a time, on some of which he accompanied her.

No attempt was made by him to refute her evidence in any other respect. There can be no doubt that her testimony established a clear case of separation without her fault and without even the color of a legal excuse on his part for deserting their home. Neither the decree nor the court's remarks before entering it can be reconciled with the evidence.

mess and indifference she said he could not play fast and loose with her like that.

It does not appear that they had any further conversations until the Tuesday preceding the hearing, May 7, 1929. It was had in the corridor of the court room in the presence of a lady who accompanied her on the trip to Honolulu. They all arranged to meet the next day at the Hawaiian Athletic Club. Then they met he said that he had nothing to say - that they had invited him. Mrs. Jackson then said she had written him in good faith and wanted him to come back. She testified to the above state of facts and they were in no respect controverted.

Then defendant took the witness stand his only attempt at justification was the statement that his wife had spent about a third of the time away from him in her travels, though he gave no details to substantiate this statement. On the contrary her testimony was to the effect that the trips she had taken, one to Honolulu, another to California, and a Mediterranean trip were taken within the previous eight years; that they altogether covered only a few months and all were with his consent and paid for by him. The lady who accompanied her to Honolulu testified that he expressed gladness at the trip and that it was with his consent. The only other trips testified to were yearly trips to visit her mother in Tacoma, W. T., for about two weeks at a time, on some of which he accompanied her.

No attempt was made by him to refute her evidence in any other respect. There can be no doubt that her testimony established a clear case of separation without her fault and without even the color of a legal excuse on his part for deserting their home. Neither the decree nor the court's remarks before entering it can be reconciled with the evidence.

The law on the subject is not at all doubtful. The right to relief under it where, as here, the evidence is sufficient to support it, does not rest upon either the discretion or caprice of the chancellor. It is as absolute as any other legal right.

As upon the evidence complainant is entitled to a decree for separate maintenance it is unnecessary to discuss the error of the court in denying complainant the right to rebut the evidence of defendant even though it was of slight importance and relevancy.

The record discloses that complainant's solicitor moved to dismiss the bill at the close of the evidence while the co rt was expressing its views of the case. Complainant unquestionably had that right. (Whitaker v. Irons, 300 Ill. 254; Fischeimer v. Kuperesmith, 258 Ill. 392.) But appellant does not insist upon it here.

Appellee urges that if a wife without sufficient justification fails or refuses to return to her husband and live with him at his reasonable request, she is not living separate from him without her fault. Not only are the authorities cited on this point cases where the wife had in the first instance left the husband but it is clear from the evidence in this case that the husband rejected the overtures of the wife for reconciliation.

The decree will be reversed and the cause remanded with directions to enter a decree as prayed for in the bill and with directions to reopen the case for further evidence, if necessary, to determine what may be a reasonable support and maintenance for complainant while the parties continue to live apart. If, however, before the entry of such decree complainant should still desire to dismiss her bill she should be permitted to do so.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Gridley, JJ., concur.

The law on the subject is not at all doubtful. The right to relief under it where, as here, the evidence is sufficient to support it, does not rest upon either the discretion or caprice of the chancellor. It is as absolute as any other legal right.

Is upon the evidence complainant is entitled to a decree for separate maintenance it is unnecessary to discuss the error of the court in denying complainant the right to rebut the evidence of defendant even though it was of slight importance and relevancy.

The record discloses that complainant's solicitor moved to dismiss the bill at the close of the evidence while the so it was expressing its views of the case. Complainant unquestionably had that right. (Mitchner v. Jones, 30 Ill. 334; Blackburner v. Kupperschmidt, 228 Ill. 388.) The appellant does not insist upon it here.

Decree upon bill - wife without solicitation

Justification fails or refuses to return to her husband and live with him as his re mon le decorum, she is not living separate from him without her fault. Not only are the authorities cited on this point cases where the wife had in the first instance left the husband but it is clear from the evidence in this case that the husband rejected the overtures of the wife for reconciliation.

The decree will be reversed and the cause remanded with directions to enter a decree as prayed for in the bill and with directions to reopen the case for further evidence, if necessary, to determine that it may be a reasonable support and maintenance for complainant while the parties continue to live apart. It, however, before the entry of such decree complainant should still desire to dismiss her bill she should be permitted to do so.

REVERSED AND REMANDED. WITH DIRECTION.

Boggian and Gridley, JJ., concur.

33695

H. M. HARDY,
Appellee,

v.

MARY POTTER SMITH,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment for $1585 appealed from is predicated upon a breach of contract of bailment to safely keep, store and return plaintiff's automobile on request. The statement of claim charges such a contract, alleges such request and a breach of the contract in failing to return the automobile on demand.

Plaintiff kept his automobile stored in defendant's garage for an agreed compensation. On the night of July 27, 1928, about 11 o'clock, plaintiff took his automobile as usual to the garage and picked up the attendant to take him home, who on his return stored the automobile unlocked a few feet away from the entrance door, which was left open. After placing defendant's car away the attendant came to the front door and saw two automobiles drive up and park across the street, and noticed that the occupants were engaged in conversation there until about 3 o'clock in the morning. In the meantime the attendant was about his usual work putting away cars in their stalls as they came in. Shortly after 3 o'clock while he was putting away a car in a remote part of the garage that was separated by a wall from the part where plaintiff's car was stored he heard a car being started up in the garage and

3206S

H. M. HANDY,
Appellee,

v.

MARY POTTER SMITH,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment for $1500 appealed from is predicated upon a breach of contract of bailment to safely keep, store and return plaintiff's automobile on request. The statement of claim charges such a contract, alleges such request and a breach of the contract in failing to return the automobile on demand.

Plaintiff kept his automobile stored in defendant's garage for an agreed compensation. On the night of July 27, 1920, about 11 o'clock, plaintiff took his automobile as usual to the garage and picked up the attendant to take him home, who on his return stored the automobile unlocked a few feet away from the entrance door, which was left open. After placing defendant's car away the attendant came to the front door and saw two automobiles drive up and park across the street, and noticed that the occupants were engaged in conversation there until about 3 o'clock in the morning. In the meantime the attendant was about his usual work putting away cars in their stalls as they came in. Shortly after 3 o'clock while he was putting away a car in a remote part of the garage that was separated by a wall from the part where plaintiff's car was stored he heard a car being started up in the garage and

went into the part where plaintiff's car was stored and saw it being driven out of the garage. He whistled for the car to stop but it went on. He then noticed that the men across the street had gone. There was no other attendant in the garage at the time. He went to plaintiff's house and learned that plaintiff had sent no one for the car. After the car was thus stolen plaintiff demanded its return and it has not been returned or apparently found. The finding of the court was predicated upon defendant's negligence as such bailee in leaving plaintiff's car unlocked near an open door under such a state of circumstances.

Whether defendant exercised that degree of care required of a bailee under such circumstances was a question of fact to be found from the evidence and we cannot say on reviewing the same that the finding was against its weight. We find nothing in the evidence not above recited that would in any way modify the conclusion of negligence on the part of the bailee under such circumstances.

The car was practically a New Chrysler car. It was only three months old and uninjured. Its price, new, delivered in Chicago was $1985. The witnesses disagreed as to its market value at the time it was stolen. There was sufficient evidence, however, from which the court could reasonably find the market value to be $1585, the amount of the judgment.

It is also contended the court erred in admitting improper evidence and in refusing proper evidence. The instances complained of, even if erroneous, are not such as should call for a reversal of the judgment.

The property was insured for $1382. The insurance, however, was not for the benefit of defendant. (Byalos v. Matheson, 328 Ill. 269.) The damages are not to be measured by the amount of the insurance but by the value of the automobile at the time

went into the yard where plaintiff's car was stored and saw it being driven out of the garage. He waited for the car to stop but it went on. He then noticed that it was across the street and gone. There was no other attendant in the garage at the time. He went to plaintiff's house and learned that plaintiff had sent no one for the car. After the car was thus stolen plaintiff demanded its return and it has not been returned or apparently found. The finding of the court was predicated upon defendant's negligence in not failing to leaving plaintiffs car unlocked near an open door under such a state of circumstances.

Neither defendant's negligence nor a degree of care required of a bailee under such circumstances was a question of fact to be found from the evidence and in order to say on review the same that the finding was against the weight. A fair reading in the evidence not above recited that would in any way modify the conclusion of negligence on the part of the bailee under such circumstances.

The car was practically a new Chrysler car. It was only three months old and mileagered. Its price, new, delivered in Chicago was $1800. The witnesses disagreed as to its market value at the time it was stolen. There was sufficient evidence, however, from which the court could reasonably find its market value to be $1000, the amount of the judgment.

It is also contended the court erred in admitting improper evidence and in refusing proper evidence. The numerous complaints of, even if erroneous, are not such as should call for a reversal of the judgment.

The judgment is affirmed for $1000. No inconvenience, however, is not for the benefit of defendant. Chicago v. Lathrop, 328 Ill. 188. The case was tried and is governed by the amount of the judgment but by the value of the automobile. At the time

it was stolen. (Osgood v. C. & N. W. Ry., 253 Ill. App. 465.)

While the pleading may not answer the technical requirement of a common law pleading it is sufficient under the practice of the Municipal Court. It apprised defendant of the nature of the claim, and as he took issue and adduced evidence upon the theory of a breach of such contract he is in no position to question the sufficiency of the statement of claim in this court.

Accordingly the judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

it was stolen. (Gurney v. G. S. R. R., 58 Ill. App. 465.)

While the pleading may not answer the technical requirements of a common law pleading it is sufficient under the practice of the municipal court. It apprised defendant of the nature of the claim, and we do not think mere and redundant evidence upon the theory of a tort of such character as to be no position to question the sufficiency of the statement of claim in this case.

Accordingly the judgment is affirmed.

AFFIRMED.

Gordon and Gridley, JJ., concur.

33740 4 Ga 255 I.A. 616

VERNA MESUHAS,
Appellee,

v.

ANTON MARSHALL,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $500 in a personal injury suit tried with a jury.

The evidence discloses that on March 6, 1927, several persons, including plaintiff and defendant, were gathered together socially at the home of appellee's brother. Between 7 and 8 p. m. they left the house intending to go to their respective homes. When plaintiff's brother spoke about taking them home in his Ford car one of them suggested that it was not large enough and thereupon, as the evidence tends to show, defendant, having a large car, enclosed model, invited them to go with him. Thereupon he and his wife and plaintiff took the front seat, he driving, and Mr. and Mrs. Orban and Mrs. Kobilis sitting in the rear seat. When on Washington boulevard, going east, they reached 19th street, the automobile collided with a street car, causing the injuries of which plaintiff complains. The car had entered Washington boulevard and turned east thereon about two or three blocks west from the point of the accident. While driving on Washington boulevard plaintiff testified that the speedometer indicated 42 miles an hour and at times indicated a speed near 50 miles an hour; that defendant's wife, as they approached Washington boulevard, said, "don't go so fast, we are coming near Washington boulevard;" that he "stepped on the gas," told her to shut

53760

VERNA MARSHALL,

Appellee,

v.

ANTON MARSHALL,

Appellant.

[illegible] COURT,

[illegible] COUNTY.

[illegible] JUDICIAL DISTRICT.

HONORABLE [illegible] JUDGE.

OPINION OF DIVISION OF THE COURT.

This is an appeal from a judgment for $[illegible] in a personal injury suit tried with a jury.

The evidence discloses that on June 6, 1937, several persons, including plaintiff and defendant, were assembled together socially at the home of appellee's brother. Between 7 and 8 p. m. they left the house intending to go to their respective homes. Upon plaintiff's request appellee drove that evening from home in his Ford car one of them suggested that it was not large enough for three-upon, so the evidence tends to show, defendant, having a large coupe enclosed model, invited them to go with him. Thereupon he and his wife and plaintiff got in the front seat, he driving, and Mr. and Mrs. Orban and Mrs. Marshall riding in the rear seat. Upon Washington Boulevard, going west, they reached [illegible] Street, the automobile collided with a street car, causing the injuries of which plaintiff complains. The car had entered [illegible] Boulevard and turned east thereon about ten or thirty minutes after the point of the collision. While driving on Washington Boulevard plaintiff testified that the speedometer indicated 45 miles an hour. [illegible] a speed near 35 miles an hour. [illegible] Mr. and Mrs. Washington Boulevard, said: "I'm go to [illegible] Washington Boulevard." That he "stepped on the [illegible] to stop

her mouth; that plaintiff then shouted, "the street car," and "hollered" just before the accident. One of the other occupants of the car in the back seat testified that the car was going very fast and she heard some one in the front seat say, "don't go so fast," and right after that the accident happened. A witness who got off the street car at the intersection of 19th street and Washington boulevard testified that in his opinion the car was going between 40 and 60 miles an hour; that it struck the street car somewhere to the rear of its center and derailed it. Defendant himself testified that he was going about 25 miles an hour at the time but that he never saw the street car until he ran into it. There was nothing to indicate why he should not have seen the street car had he been in the exercise of ordinary care and the jury were warranted in finding from his own testimony negligence in attempting to cross the street at such a time and place under such a rate of speed without looking to see whether there was a street car at the intersection or about to cross it.

The point made that the verdict was against the weight of the evidence is not well taken, and that there would be a liability under such circumstances cannot be doubted.

Complaint is made as to the amount of the judgment. While plaintiff was not severely injured she was cut about the head, chest and legs. Her jaw was bruised and her teeth loosened, necessitating numerous visits to a doctor and a dentist. While the evidence shows liability to them on her part, the amount due or payable to them was not testified to except as to one paid bill for $15. At the time of the accident she was earning $25 a week. She was kept out of her employment for about three weeks and when she went back it was at a reduced wage for a considerable period of time not definitely stated. We cannot say, however, that the judgment is excessive in view of the nature of her injuries and that state

her mother; that plaintiff then shouted, "the street car," and "motioned" just before the accident. One of the other occupants of the car in the back seat testified that the car - a young very fast and she heard some one in the front seat say, "don't go so fast," and right after that the accident happened. Witness who got off the street car at the intersection of 10th street and Washington boulevard testified that in his opinion the car was going between 25 and 30 miles an hour; that it struck the street car somewhere in the rear of its center and derailed it. Plaintiff himself testified he was going about 7 miles an hour; the time but that he never saw the street car until he was into it. There was nothing to indicate why he should not have seen the street car had he been in the exercise of ordinary care. The jury were warranted in finding from his own testimony negligence in attempting to cross the street at such a time and place under such a rate of speed without looking to see whether there was a street car in the intersection or about to cross it.

The point made that the verdict was against the weight of the evidence is not well taken, and it [illegible] would be a liability under such circumstances [illegible] disturbed.

Complaint is made to the admission of the testimony.

While plaintiff was not permitted to prove the car was about the head, speed and lights. [illegible] excluded the car speed testimony, necessitating numerous objections, rulings, answer and a remittitur. While the evidence shows liability to some [illegible], in view of the inability to show was not justified in [illegible] the verdict for $15. [illegible] the time of the collision [illegible] $25. He was kept out of her employment for [illegible] weeks and [illegible] went back it was a [illegible] time. [illegible] time not definitely stated. [illegible] amount, but the recovery is excessive in view of the nature of her injuries and [illegible] state

of facts.

It appeared from the testimony that one of the passengers died three days after the accident. The testimony was stricken on defendant's motion. It is urged that it was sufficiently prejudicial to require a reversal of the judgment. The judgment is too small to make the point presumsive.

It is urged in the brief that there should have been a new trial granted on affidavits as to newly discovered evidence. The point is made, however, without having abstracted the affidavits or referred to their contents. In such a case we will not search the record for their contents to reverse the judgment.

The judgment is affirmed.

AFFIRMED.

Scanlan and Gridley, JJ., concur.

of facts.

It appears from the stenography in 3 one of the newspapers that three days after the verdict. The statement was written on defendant's motion. It is urged that it was not intended merely judicial to require a reversal of the judgment. The judgment is too small to make the point preemptive.

It is urged in the brief in 3 there should have been a new trial granted on affidavits of the newly discovered evidence. The point is made, however, without quoting short view the affidavits or referred to their contents. A mere [illegible] will not enough the record for their examination to reverse the judgment.

The judgment is affirmed.

affirmed.

Hamilton and Tindley, JJ., concur.

4/a

25 I.A. 317

33750

WILLIAM E. FOX,
Appellee,

v.

HELEN E. FOX,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting complainant a divorce on the ground of desertion, and dismissing for want of equity defendant's cross bill praying for separate maintenance.

The parties were married September 13, 1926. The original bill, filed November 5, 1926, asked an annulment of the marriage on the ground that it was never consummated by the parties having sexual intercourse; that up to October 13, 1926, defendant refused to have the relation and thereupon complainant left the apartment they were occupying. The parties, however, resumed living together in the same apartment on November 15th and continued to live there and occupied the same bed for four months thereafter, until March 17, 1927, when he again left her and went to live with his mother and sister.

It is inferable from the record that the lease to the apartment they had occupied expired on October 1, 1927, that she occupied the apartment up to that time, and that he continued to pay the rent therefor and paid her a weekly allowance. The parties never lived together after he left her as aforesaid in the previous March.

No action seems to have been taken after the filing of the bill until August 26, 1927, when on leave given she answered

[illegible]

WILLIAM H. FOX,
Appellee,

v.

MAYS S. FOX,
Appellant.

APPEAL FROM DECISION
OF THE COURT OF [illegible] COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree granting complainant a divorce on the ground of desertion, and claims the [illegible] of a guilty defendant's [illegible] will [illegible] for [illegible] maintenance.

The pleadings were [illegible] November 17, 1920. The original bill, filed November 5, 1920, [illegible] the marriage on the ground that [illegible] by the [illegible] having [illegible] intercourse that up to October [illegible], 1920, [illegible] the relation and [illegible] complainant left the apartment they were occupying. The parties, [illegible], returned living together in the same apartment in November 1920 and continued to live there and occupied the same [illegible] until [illegible], 1921, when [illegible] the [illegible] was [illegible].

It is [illegible] to the apartment they had occupied [illegible] 1, 1920, [illegible] occupied the apartment [illegible] the [illegible] of [illegible] never lived together [illegible] in the [illegible] March.

No action seems [illegible] the filing of the bill until August 18, 1920, when [illegible]

the bill of complaint denying the charges therein. No further action seems to have been taken until March 28, 1929, when she filed her cross-bill for separate maintenance. Two months later, on May 27, 1929, complainant filed an amended bill setting forth the same charge as in the original bill and the additional charge of desertion for over two years. Defendant's answer to the amended bill denied the charges made therein and repeats the charge made in her cross bill of his abandonment of her without justification.

Outside of complainant's own testimony there was no evidence tending to confirm his statement that there was no sexual intercourse between the parties during their marriage except the evidence of his mother and his sister to alleged admissions of the want of such relations made within a week after their separation in March, 1927. They testified that defendant about that time came to the home of the mother where William had gone to live and wanted him to return and give her "another chance." The mother testified that she told defendant "it was no use in asking him any more." It appears without explanation that the mother never visited their apartment. While defendant denied ever having made any such admissions and testified affirmatively to sexual relations with her husband frequently during the four months after November 15th, they lived together and occupied the same bed, yet if the testimony of the mother and sister be true that she expressed a willingness right after the final separation to perform her marital relations there would seem to be no justification in complainant's failure to return to her.

It appears, however, from several undated letters from defendant to complainant, apparently written between the time of the separation and October, 1927, that the feelings between them had become much strained. In them she chides him for claiming such a ground for their separation, berates him for unmanliness and refers to a "disease" he had. In the third letter she states that she is

the bill of complaint denying the charges therein. No further action seems to have been taken until March 30, 1938, when she filed her cross-bill for separate maintenance. Two months later, on May 27, 1938, complainant filed an amended bill setting forth the same charge as in the original bill and the additional charge of desertion for over two years. Defendant's answer to the amended bill denied the charges made therein and repeated the charge made in her cross bill of his abandonment of her without justification.

Outside of complainant's own testimony there was no evidence tending to confirm his statement that there was no sexual intercourse between the parties during their married life. The evidence of his mother and his sister to alleged admissions of the part of such relations made within a week after their separation in March, 1937. They testified that defendant stated that time was he the home of the mother where Jillian had come to live and wanted him to return and give her "another chance." The mother specifically that she told defendant "it was no use in making him any more." It appears without explanation that the mother never visited their apartment.

While defendant denied ever having made any such admissions and testified affirmatively to sexual relations with her husband frequently during the four months after "October 15th, they lived together and occupied the same bed, yet in the testimony of the mother and sister be true that she expressed a willingness right after the final separation to permit her marital relations there could seem to be no justification in complainant's failure to return to her.

It appears, however, from several unsealed letters from defendant to complainant, particularly written between the time of the separation and December, 1937, that the feelings between them had become much strained. In them she entreats him for allowing such a ground for their separation, berates him for unwillingness she refers to a "disease" he has. In the latter letter she admits that she is

through coaxing him, that he is no longer worthy of her love and that he had treated her worse than a "drunkard." In a later letter she refers to his refusal to pay rent after October 1, and states that he has ruined her life after "playing around" with her for seven years; that she had been good and loyal to him; that he had wasted her life and that she would never take him back. In her later letters she expressed a desire for a divorce and that they reach some understanding with regard to it.

No oral evidence was given in explanation as to any of the facts hinted at in these letters except that the husband denied that he was diseased.

We cannot but be impressed from the entire record that there was a reluctance on the part of both parties to testify to the real facts that caused their separation.

To establish desertion complainant relies entirely upon the claim made in the original bill. No proof or charge of disloyalty or prior lack of virtue was preferred against defendant. There was medical testimony tending to confirm her testimony as to the existence of such relationship during the four months from November 15th after they were married. They were young people, both under 30 years of age. In the absence of proof of any facts or circumstances having a natural tendency to confirm the husband's bare statement that there were no sexual relations during the four months in question we deem her testimony on the subject far more probable and reliable than his. That a state of incompatibility arose between them cannot be doubted, but the cause of it has manifestly been concealed by both parties. If her testimony on the subject of their relations is to be accepted then the proof presents a case of desertion on his part instead of hers and the decree so far as based on the bill must be reversed.

At the same time we are not satisfied that cross-complainant

through coaxing him, that he is no longer worthy of her love and that he had treated her worse than a "drunkard." In a later letter she refers to his refusal to pay rent after October 1, and states that he has ruined her life after "playing around" with her for seven years; that she had been good and loyal to him; that he had wasted her life and that she could never give him back. In her later letters she expressed a desire for a divorce and that they might come understanding with regard to it.

Material evidence was given in explanation as to any of the facts hinted at in these letters except in the husband denied that he was divorced.

It cannot but be inferred from the entire record that there was a reluctance on the part of both parties to testify to the real facts that caused their separation.

In conclusion [illegible] conditions relied entirely upon the claim made in the original bill. No proof or charge of disloyalty or prior lack of virtue was preferred against defendant. There was no moral testimony [illegible] to contradict her testimony as to the existence of such relationship [illegible] the month from November 15th after they were married. [illegible] people, with ages of [illegible] years of age. In the absence of proof of [illegible] or circumstances having a natural tendency to confirm the husband's bare statement that there was no lawful [illegible] during the four months in question [illegible] for were probable and reliable than his. [illegible] of improvidently arose between them [illegible], but the cause of it has satisfactorily been [illegible] by both parties. If her testimony [illegible] of their relations is [illegible] of desertion on his part [illegible] based on the bill must be [illegible].

[illegible] the same time [illegible] a [illegible]

presented adequate proof, when all the testimony is taken together, that the parties had been living apart wholly without her fault. While she states in her cross bill that she is willing to return to her husband her letters written prior to the filing thereof indicate that she is not. She made no affirmative proof of living apart without her fault. (Bielby v. Bielby, 333 Ill. 478, 486.)

The case appears to have been tried in a manner not to bring out the real facts and, in our opinion, neither party made out a case. Accordingly the decree will be affirmed as to dismissal of the cross bill for want of equity and reversed as to granting a divorce on the bill, and the cause will be remanded with directions to dismiss the bill for want of equity.

AFFIRMED IN PART AND REVERSED IN PART.

Scanlan and Gridley, JJ., concur.

presented adequate proof, when all the testimony is taken together, that the parties had been living apart morally, without the right. While one sphere in her cross bill that she is willing to return to her husband her interest arises prior to the filing thereof insofar that she is not. She made no affirmative proof of living apart without her fault. (Mielke v. Mielke, 120 Ill. App. 484.)

The court appears to have been loath to permit not to bring out the real facts and, in our opinion, neither party made out a case. Accordingly the cause will be affirmed, at the costs of the cross bill for want of equity and provided it be proved a divorce on the bill, and the cause will be remanded with directions to dismiss the bill for want of equity.

AFFIRMED IN PART, REMANDED WITH DIRECTIONS.

Gaston and Dilger, JJ., concur.

33593 4 2a

255 I.A. 617

GUNNAR ANDERSON, a minor, by Sieverth Anderson, his next friend,
Appellee,

v.

JACOB LUDVIGSEN,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 16, 1929, following the verdict of a jury, plaintiff recovered a judgment against defendant for $4750, in an action for damages for personal injuries. This appeal followed.

Plaintiff's declaration, to which defendant filed a plea of not guilty, consisted of six counts. In the first it is alleged that on September 2, 1927, defendant was driving his automobile northerly on State street, a public highway in Chicago, at or near its intersection with 84th street; that plaintiff was lawfully upon State street at or near the intersection and was in the exercise of ordinary care for his own safety; and that defendant so negligently operated his automobile that it struck or ran over plaintiff, whereby he was seriously and permanently injured, etc. The second count charged defendant with willful and wanton negligence. The third and fourth counts allege violations of the Motor Vehicle Act as to the rates of speed of such vehicles in residential and business districts in incorporated cities. The fifth count alleged a violation of an ordinance of the City of Chicago requiring vehicles, upon overtaking a street car stopped for the purpose of discharging or taking on passengers, to come to a stop, etc. The sixth count alleged that defendant negligently failed to keep a

33809

GUNNAR ANDERSON, a minor,
by Oliverth Anderson, his
next friend,

Appellee,

v.

JACOB NIJVERSEN,

Appellant.

APPEAL FROM DECISION
COURT, COOK COUNTY.

MR. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

On March 10, 1924, following the verdict of a jury, plaintiff recovered a judgment against defendant for $4750, in an action for damages for personal injuries. This appeal follows.

Plaintiff's declaration, to which defendant filed a plea of not guilty, consisted of two counts. In the first it is alleged that on September 2, 1922, defendant was driving his automobile northwardly on Cable street, a public highway in Chicago, at or near its intersection with 26th street, when plaintiff was lawfully upon Cable street, and as he, the intersection, was in the exercise of ordinary care for his own safety and that defendant negligently operated his automobile that it struck or ran over plaintiff, thereby he was violently and permanently injured, etc. The second count charged defendant with similar and further negligence. The third and fourth counts allege that at the time and place set forth in the first count defendant violated the ordinances of the city of Chicago in reckless and dangerous disregard of the safety of others. The fifth count charges a violation of the ordinance of the city of Chicago in driving vehicles, upon overtaking a street car [illegible] or in the [illegible], or disembarking or making or passengers, [illegible] to come to a stop, etc. The sixth count alleges that defendant negligently failed [illegible]

proper lookout or to give any signal or warning of his automobile's approach.

In addition to the general verdict against defendant the jury returned a special finding to the effect that he was not guilty of willful and wanton conduct.

The testimony of plaintiff's many occurrence witnesses disclosed the following: On the morning of September 2, 1927, about 7 o'clock, plaintiff a boy of about 15 years of age, was a passenger on a north bound State street car. As the car approached 84th street he told the motorman, Watt, that he wanted to get off at that street. The motorman stopped the car at the regular stopping place, - the front of the car being a few feet south of the south cross-walk of 84th street. Upon the motorman opening the door plaintiff alighted and started for the sidewalk on an angle. Suddenly and without warning, and after plaintiff had taken a step or two, defendant's automobile, driven by him, came past the car between it and the east curb of State street at a speed in excess of 25 miles an hour. A front part of the automobile struck plaintiff and he was carried, probably on the left front fender, clear across 84th street, where he fell off or was thrown off. When picked up his body was lying east of the car tracks and north of the north curb line of 84th street. The automobile, swerving a little to the right, ran over the northeast curb of the intersection and against a fire plug or hydrant with such force that the plug was bent over about a foot.

Defendant was the only occurrence witness called in his behalf. He testified that he was driving his automobile north in State street and travelling about 20 or 25 miles an hour; that he was trying to pass the street car on its right; that the boy stepped off the car and in front of the moving automobile when it was only a few feet away from him; that when he (defendant) saw the car door

proper lookout or to give any signal or warning of his approaching approach.

In addition to the general negligent operation defendant the jury returned a special finding to the effect that was not guilty of willful and wanton conduct.

The testimony of plaintiff's only eyewitness witness disclosed the following: On the morning of September 2, 1947, about 7 o'clock, plaintiff, a boy of about 13 years of age, was a passenger on a north bound State street car. As the car approached Bath street he told the motorman, that he wanted to get off at that street. The motorman stopped the car at the safety platform, the front of the car being a few feet south of the south crosswalk of Bath street. Upon the motorman opening the door, plaintiff alighted and started for the sidewalk on the east. Automobile and streetcar traffic, and after plaintiff had taken a step or two, defendant's automobile, driven by him, came past the car between it and the left curb of State street at a speed in excess of 25 miles an hour. From part of the automobile struck plaintiff and he was a ruled, probably on the left front fender, slid across Bath street, where he fell off or was thrown off. Then picked up the body of a lad lying west of the car tracks and north of the north curb line of Bath street. The automobile, swerving to the left after, ran on, the northeast curb of the intersection and [illegible] a tree. [illegible] such force that the lad was hurl over a [illegible].

Defendant was the only witness [illegible] behalf. He testified that he was [illegible] the automobile [illegible] State street and travelling about [illegible] when he was trying to pass the street car on [illegible] that the car had in front of the [illegible] a few feet away from that [illegible]

open and the boy step out he applied his brakes and by turning the automobile to the right endeavored to avoid hitting him, and "then I went into the fire plug;" and that when the boy stepped out of the standing street car, its front end was about seven feet north of the south curb line of 84th street.

Defendant's counsel first contend that the general verdict, on the questions of defendant's negligence and plaintiff's contributory negligence, is against the manifest weight of the evidence. Both of these questions were for the jury to determine and we think that under all the facts and circumstances disclosed their verdict is amply sustained by the evidence and should not be disturbed. (Stack v. East St. Louis Ry. Co., 245 Ill. 308, 310-11; Mulligan v. Andel, 245 Ill. App. 138, 140.)

Defendant's counsel also contend that the court committed error in giving, among the series of instructions, instruction No. 6, offered by plaintiff, as follows:

> "In the absence of some warning or evidence to the contrary, the plaintiff, in the exercise of due care, had a right to assume that the defendant would obey the ordinance of the City of Chicago in evidence relating to the passing of street cars by motor vehicles operated on the streets of said city; and, if you find from the evidence that the street car from which plaintiff alighted was at that time stopped for the purpose of discharging or taking on a passenger or passengers, then the plaintiff, in the exercise of due care, had a right to assume in the absence of warning or evidence to the contrary that the motor vehicle operated by the defendant would not pass or approach within ten feet of said street car as long as said car was so stopped or remained standing for the purpose of discharging or taking on a passenger or passengers."

The ordinance of the City of Chicago (Municipal Code, 1922, Sec. 3325, p. 1056), upon which the instruction is predicated, was introduced in evidence by plaintiff without objection. In view of the practically undisputed evidence as above outlined we do not think that the court erred in giving the instruction.

Equally without merit in our opinion is counsels'

open and the boy step out he spilled his frames and by turning the automobile to the right manoeuvered to avoid hitting him, and "then I went into the fire plug," and that when the boy stepped out of the standing street car, his front and was about seven feet north of the south curb line of 16th street.

Defendant's counsel first contend that the general verdict, on the questions of defendant's negligence and plaintiff's contributory negligence, is against the manifest weight of the evidence. Both of these questions were for the jury to determine and we think that under all the facts and circumstances disclosed their verdict is amply sustained by the evidence and should not be disturbed. (Hayes v. Great St. Louis Ry. Co., 242 Ill. App. 214; Hillgrove Building v. Ambel, 244 Ill. App. 72, 74.)

Defendant's counsel also contend that the court committed error in giving, among the series of instructions, instruction No. 6, offered by plaintiff, as follows:

> "In the absence of any warning or evidence to the contrary, the plaintiff, in the operation of his motor, had a right to assume that the defendant would keep the ordinance of the city of Chicago in evidence, forbidding the passing of street cars by motor vehicles operated on the streets of said city; and, if you find from the evidence that the street car from which plaintiff alighted was at this time stopped for the purpose of there taking on or letting off a passenger or passengers, then the plaintiff, in the exercise of due care, had a right to assume that the defendant would stop or at least so far as concerns the motor vehicle operated by the defendant would not pass or proceed within the feet of said street car on the side of said car upon which the passenger or passengers were alighting or getting on or off."

The ordinance of the city of Chicago (municipal code, 1922, Sec. 2222, p. 1042), upon which the instruction in question was introduced in evidence by plaintiff, [illegible] . . . view of the [illegible] . . . we do not think [illegible] . . . actually stopped with its one [illegible] . . .

further contention that the court erred in refusing to give instruction No. 3, offered by defendant. It directed a verdict for defendant and one of the assumptions of fact in it was that the street car did not stop at its regular stopping place at 84th street, while the undisputed evidence disclosed that the car had there stopped for the purpose of discharging a passenger or passengers immediately before the happening of the accident. For the court to have given the offered instruction would have been error. (Bullock v. Narrott, 49 Ill. 62, 65; Alton Lime & Cement Co. v. Calvey, 47 Ill. App. 343, 348; Chicago & Alton R. Co. v. O'Leary, 102 Ill. App. 665, 667.)

Counsel further contend that the verdict and judgment of $4750 are excessive. We do not think so. After the accident plaintiff was taken to the Auburn Park Hospital and there given treatments for nearly four months. He was unconscious for the first four or five days. He suffered a cerebral concussion and a compound fracture of the tibia and fibula of the right leg. Parts of the bones were comminuted and, because of this and the fact that dirt and cloth had worked into the leg, an infection developed. Thereafter shall pieces of bone from time to time were removed from the leg. After his removal from the hospital plaintiff received daily treatments at his home for more than a month and thereafter occasional treatments for about a year. At the time of the trial in February, 1929, his leg was still being dressed about once a week because of continuing discharges from the small sinus. As a result of the accident there is a permanent shortening of the leg about 3/4ths of an inch and a loss of hearing in plaintiff's left ear of about 30 per cent. The hospital charges amounted to $434.50, and the physician's charges $1,000.

Counsel further contend that the court committed pre-

further contention that the court erred in refusing to give instruction No. 6, offered by def endant. It directed a verdict for defendant and one of the assumptions of fact in it was that the street car did not stop at the regular stopping place at 54th street, while the undisputed evidence showed that the car had there stopped for the purpose of discharging a passenger or passengers immediately before the happening of the accident. The court is here given the offered instruction would have been error. (Whitlock v. Harrel, 19 Ill. App. 69; Illinois Cent. R. Co. v. Cathey, 47 Ill. App. 344; Chicago & Alton R. Co. v. O'Leary, 144 Ill. App. 595, 597.)

Counsel further contend that the verdict and judgment of $4750 are excessive. We do not think so. After the accident plaintiff was taken to the Cook County Hospital and there given treatment for nearly four months. He was discharged for the first time on February 1, 1920. He suffered a serious concussion and a compound fracture of the tibia and fibula of the right leg, both of the bones were comminuted, and, because of pain and the fact that cast and splint had worked into the leg, an infection developed. Therefrom small pieces of bone came to the surface and were removed from the leg. Ether was removed from the hospital. Initially recovery did not take place as the leg was for many days a source and therefrom occasionally discharge for about a year. At the time of the trial in February, 1920, the leg was still being treated about once a week because of continuing pain from the small splinter. In a result of the accident there is a permanent deformation of the leg about 1/16th of an inch and a lessened bending in plaintiff's left ear of about [illegible] per cent. The surgical charges amounted to [illegible] and the physician's on [illegible].

Counsel further contend that the court committed [illegible]

judicial error in allowing to be introduced in evidence as plaintiff's exhibit 4, over defendant's objection, pieces of bone contained in a small box, which pieces Dr. Barnes, the attending physician, testified he had removed from plaintiff's leg. Inasmuch as the jury's verdict is not excessive and there is nothing gruesome about the exhibit, we do not think that the court abused its discretion in allowing the exhibit in evidence and to be examined by the jury, or that any prejudice to defendant resulted. (Wagner v. Chicago etc. R. Co., 277 Ill. 114, 118; Tudor Iron Works v. Weber, 129 Ill. 535, 538-9; Bauer v. Knapp, 174 Ill. App. 533, 535; Seltzer v. Saxton, 71 Ill. App. 229, 234.)

For the reasons indicated the judgment of the superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

judicial error in allowing to be introduced in evidence as plaintiff's exhibit 6, over defendant's objection, pieces of bone contained in a small box, which placed Dr. Bunker, the attending physician, in a position to remove the plaintiff's leg. Inasmuch as the jury's verdict is not excessive and there is nothing prejudicial, so it appears, we do not think that the court abused its discretion in allowing the exhibit in evidence and to be examined by the jury, we find no prejudice to defendant resulted. (Kramer v. Chicago R. I. & P. R. R. Co., 277 Ill. 114, 116; Tucker Iron Works v. Ebert, 149 Ill. 458, 458-61; Hunter v. Sharp, 174 Ill. App. 581, 588; Litzner v. Hanson, 71 Ill. App. 515, 524.)

For the reasons indicated, the judgment of the superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Gemmill, J., concur.

43a

33602

CHARLES L. AGNE,
Appellant,

v.

ALVIN SABEL and BEN ZIVOF, copartners, doing business as Famous Garage,
Appellees.

255 I.A. 617

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the Superior court, entered March 22, 1929, vacating a judgment for $3,000 against defendants, entered after verdict upon an ex parte trial had in the absence of defendants on April 6, 1928. The order is based upon section 89 of the Practice Act, which provides that all errors in fact in the proceedings, which by the common law could have been corrected by a writ of error coram nobis, may be corrected, upon written motion and reasonable notice, at any time within five years, etc.

Plaintiff's action was commenced in December, 1926, and the declaration disclosed a claim for damages on account of defendants' negligence in allowing plaintiff's Packard automobile, stored in their garage, to be taken away by a third party whereby it was wholly lost to plaintiff. Defendants filed a plea of the general issue.

The common law record discloses that during October, 1928, long after the term had passed at which the judgment in question was entered, defendants filed their motion to vacate it, and that during November, 1928, leave was given them to file an affidavit of their attorney, Julian J. Luster, in support of the

[illegible]

CHARLES E. ADAMS,
Appellant,

v.

ALVIN [illegible] and [illegible]
GIVOT, copartners,
doing business as
Vernon Garage,
Appellees.

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order of the superior court, entered March 26, 1929, vacating a judgment for $3,000 against defendants, entered after default upon an ex parte trial had in the [illegible] on April 9, 1928. The order is based upon section 69 of [illegible] Statutes 1927, which provides that all claims in [illegible] lien, which by the common law would have [illegible] of other [illegible] mobile, may be foreclosed, upon [illegible] at any time within five years, etc.

Plaintiff's action was commenced in [illegible], and the declaration alleges a claim for [illegible] of defendants' negligence in storing plaintiff's [illegible] automobile, stored in their garage, to be [illegible] by a [illegible] during which it was wholly lost to plaintiff. [illegible] plea of the general issue.

The common law [illegible]

1928, long after the [illegible] in question was entered, defendants filed [illegible] motion to vacate it, and their [illegible] affidavit of their attorney, [illegible] and [illegible] of the

motion.

The bill of exceptions discloses the grounds of the motion to vacate the judgment, viz., (a) "an error in point of fact, not appearing on the face of the record, has been committed through the default of the clerk of the court," and (b) the ex parte hearing of the cause was due "to an accident and mistake of fact that the cause be continued to June 4, 1928," which was not known to the presiding judge, etc.

In Luster's affidavit he states that the cause had originally been assigned to the calendar of Judge Wells M. Cook, who because of sickness could not call the calendar, and the same from time to time was being called by a judge from outside of Cook county when acting as a superior court judge in this county; that on the morning of April 6, 1928, affiant appeared before Judge R. M. Fowler (then calling said calendar) and, in the absence of plaintiff's attorney, the cause "was continued to June 4, 1928," and thereafter affiant left the court room; that "all memoranda of continuances are kept by the minute clerk in each court room;" that on the afternoon of April 6th, "by accident, mistake or default of the clerk, calling the cases, or by some means unknown to affiant;" the cause was heard before a jury ex parte and the judgment entered; that afterwards, on June 2, 1928, there appeared in the Chicago Law Bulletin, which publishes all court calls in Chicago, a notice that all cases set for trial for June 4th (election day) would be called on June 5th, and that under the name of Judge Harris (then calling said calendar) appeared a list of cases to be then called for trial, including the case of Agne v. Sabel; that on June 5th said case was called for trial by Judge Harris, and he ordered it dismissed for want of prosecution; that in the "daily dairy" of the clerk for the judge calling said

motion.

The bill of exceptions discusses the grounds of the motion to vacate the judgment, viz., (a) "an error in point of fact, not appearing on the face of the record, has been committed through the default of the clerk of the court;" and (b) the ex parte hearing of the cause a day "be an accident and mistake of fact that the cause be continued to June 4, 1928," which was not known to the presiding judge, etc.

In Lawson's affidavit he states that the cause had originally been assigned to the [illegible] Judge Willis B. Cook, who because of sickness could not call the docket, and the case from time to time was being called by a judge from outside of Cook county sitting as a supervisor court judge in this county; that on the morning of April 4, 1928, affiant appeared before Judge Mr. Sawyer (then sitting [illegible] Chancery) and, in the absence of plaintiff's attorney, the case was continued to June 4, 1928;" and therefore, that [illegible] court found that "all memoranda of continuances are kept by the minute clerk in each court room;" that on the afternoon of April 4th, by accident, mistake or default of the clerk, calling the docket, or by some person unknown to affiant," the cause was [illegible] a jury [illegible] and the judgment entered; that [illegible], on June 4, 1928, came appeared in the Traffic [illegible] [illegible] all court calls in Chicago, a notice that all [illegible] the [illegible] Ken [illegible] (election day) would be [illegible] [illegible] the [illegible] of Judge Harris (then sitting [illegible]) [illegible] a list of cases to be [illegible] for trial, [illegible] [illegible] of April 4, [illegible] that on June 4th [illegible] [illegible] Judge Harris, and he entered it [illegible] [illegible] in the "daily daily" of the clerk for the judge sitting said

calendar, and under date of June 4th, appeared the case (among others) of Agne v. Sabel as being set for that day; and that "had Judge Fowler known that an order had been entered, postponing the cause to June 4th, he would not have entered said judgment."

It will be noticed that, in neither the motion nor affidavit supporting it, is it stated what the particular "default" of the clerk was prior to the entry of said judgment, or that the cause was, on the morning of April 6th, continued to June 4th by any order of court. And the common law record does not disclose that any such order of continuance was entered. It will further be noticed that the statements in the affidavit as to the notice in the Law Bulletin, the clerk's diary and the proceedings before Judge Harris on June 5th all refer to happenings after the judgment in question had been entered.

To defendants' written motion to vacate the judgment plaintiff filed a special demurrer, setting forth various reasons why the motion should not be granted, among which in substance are that the court had no jurisdiction to vacate the judgment - the term having passed; that no such error in fact had intervened prior to the entry of the judgment as, under the provisions of the coram nobis statute, warranted the vacation of the judgment; and that the error relied upon for such vacation "did not intervene in said proceedings but arose subsequent to said hearing and judgment."

The bill of exceptions further discloses that on March 22, 1929, a hearing on the motion and demurrer was had before Judge Fowler, who had been the presiding judge at the trial resulting in the entry of the judgment; that on the hearing defendants presented Luster's affidavit and also an unfiled affidavit, not of record, of Harold Green, an assistant to Luster; that Green's affidavit was to the effect that he on the morning of April 6th was in court "when

[illegible] calendar, and [illegible] date of [illegible] Act, [illegible] the [illegible] (among others) of [illegible] v. [illegible] not be [illegible] jury was [illegible] There longer [illegible] when we [illegible] been [illegible], considering the cause to [illegible] Act, we would not have entered such judgment.

It will be noticed that, in addition to [illegible] motion for [illegible] it states that the [illegible] of the [illegible] was [illegible] of said judgment, or that the cause was, on the [illegible] of April 4th, continued to [illegible] and order of court. The [illegible] does not disclose that any such order of continuance was entered. It will further be noticed that the statements in the affidavit as to the notice in the law [illegible], the clerk's diary and the proceedings before Judge Harris [illegible] to be proceedings after the judgment in question had been entered.

To [illegible] motion to vacate the judgment plaintiff filed a [illegible], [illegible] the motion should not be granted, which [illegible] are that the court did not [illegible] the judgment - the term having passed [illegible] in that [illegible] to the contrary, the judgment [illegible] provisions of the [illegible] Act, [illegible] the [illegible] error relied upon [illegible] correctly [illegible] the [illegible] judgment.

[illegible] Harris [illegible] the [illegible] Davis [illegible] the [illegible] the entry of the judgment [illegible] matter's affidavit [illegible] Harris [illegible] the effect that [illegible]

Luster made a motion for a continuance of the cause and the court ordered it continued to June 4th," and that at that time no attorney for plaintiff was present; that thereupon, before the court had made any ruling on plaintiff's demurrer, plaintiff, "to maintain the issues in support of his demurrer," introduced the testimony of Marcus J. Golden, plaintiff's attorney, and Lee L. Turoff, an assistant in Golden's office; that Golden's testimony, corroborated by that of Turoff, was to the effect that the cause was on the trial call of Judge Fowler on April 4th and 6th, 1928, that he (Golden) was in that judge's court room on the morning of April 6th and before court convened at 10 a. m., that he remained there all the morning, that neither defendants nor any attorneys representing them were present, and that said cause was reached for trial about 11:45 a. m. and was thereafter and during that day tried before court and jury, resulting in the entry of the judgment; that thereupon, over plaintiff's objection, defendants introduced "a daily diary or continuance book," kept by the minute clerk of the court calling said calendar, and particularly certain items therein, under date of June 4, 1928, showing "a set of cases continued to that date among which appeared the title '<u>Agne</u> v. <u>Sabel</u>;'" that thereupon, it appearing that said minute clerk because of illness was unable to testify in court, it was stipulated between counsel that, if present, he would testify that said dairy was the book in which he, as such clerk, kept a "record of continuances," and that the cases appearing under the date of June 4th in said book were entered by him "in the usual course of business upon the order of the court;" that plaintiff's attorney objected to this testimony as being irrelevant and immaterial, which objection was overruled; and that thereupon the court entered the order appealed from vacating said former judgment. The court, in the draft order contained in the present transcript, states that "the cause coming

on to be heard upon plaintiff's demurrer to defendants' motion, * * and after arguments of counsel, * * said demurrer is overruled, and it is therefore ordered that the judgment heretofore entered herein be and the same is vacated."

We are of the opinion that the court erred in vacating said judgment of April 6, 1928. We do not find in the record any such error in fact as, under the provisions of section 89 of the Practice Act and decisions construing it, would warrant the court in vacating the judgment. No default or mistake of the clerk of the court prior to the entry of the judgment is shown, which was unknown to the judge and which, if known, would have caused him not to try the cause and not to enter the judgment. And it does not appear that prior to said trial and judgment, the court had ordered the cause continued to June 4, 1928. We regard defendants' motion and accompanying affidavits as an attempt to contradict the record of the court, which should not be allowed. Furthermore, if any default or mistake of the clerk of the court occurred after the day said judgment was entered, it cannot affect it. We think our holding is sustained by the decisions in Consolidated Coal Co. v. Oeltjen, 189 Ill. 85, 87; Cramer v. Commercial Men's Ass'n, 260 Ill. 516, 522; People v. Noonan, 276 Ill. 430, 434; Loew v. Krauspe, 320 Ill. 244, 250; and McCord v. Briggs & Turivas, 249 Ill. App. 516, 530. In last mentioned case it is said: "We think this review of authorities discloses that errors which can be corrected by motion under section 89 are only such errors of fact as go to the capacity of the parties or misprision of the clerk of the court which do not contradict the record and which if known to the court would have prevented the entry of the judgment."

The order of the court of March 22, 1929, setting aside and vacating said judgment of April 6, 1928, is reversed.

REVERSED.

Barnes, P. J., and Scanlan, J., concur.

on to be heard upon plaintiff's demurrer to defendants' motion,
" and after arguments of counsel, " said counsel, in very short,
and it is the opinion entered into the judgment herein, unless
herein be one who is mentioned.

[illegible] the opinion in the court [illegible] in vacating and
judgment of [illegible], 1920. [illegible] in the [illegible]
error in fact was under the [illegible] of the [illegible]
[illegible] constitutional [illegible] that the court to vacating
the judgment. [illegible] of the [illegible] of the [illegible]
to the county [illegible], which are [illegible] to the judge
and which, if known, would have [illegible] not to enter the judgment. [illegible] that when to sit
trial [illegible] on the bed [illegible] to
, 1920. [illegible] and [illegible]
an attempt to [illegible] of the [illegible] not be
allowed. [illegible] of [illegible] of the
court [illegible] judgment [illegible]
effect it. [illegible] in [illegible] by [illegible]
Connellsville [illegible] v. Gaither, 1[illegible] 61, 63; [illegible]
Men's [illegible], [illegible], [illegible] [illegible]
Loos v. [illegible], [illegible] 11, 14; [illegible] v. [illegible]
[illegible] 1[illegible] 61. [illegible] [illegible]
this review of authorities [illegible]
by motion [illegible]
capacity of [illegible]
do not contradict [illegible]
have [illegible]
The [illegible]
vacating and [illegible]
Barnes, [illegible]

33620

255 I.A. 617

MORRIS LEVINKIND,
Complainant and Appellee,

v.

SILAS HOPP et al.,
Defendants,

On appeal of SHERIDAN TRUST SAFE DEPOSIT CO., a corporation, one of the defendants,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The sole question involved in this appeal is whether the Court, following reports of the master, properly taxed certain sums as costs and properly adjudged that the Sheridan Trust Safe Deposit Co. (hereinafter referred to as the Sheridan Co.) should pay to complainant $243 of said costs previously advanced by complainant. Complainant's motion to strike from the record the bill of exceptions of the Sheridan Co., and to dismiss its appeal, was reserved to the hearing.

Complainant's bill, filed October 1, 1926, sought to foreclose a second mortgage for $6,000. Various parties claiming interests in the premises were made defendants and, after issues joined and after a hearing before a master and the filing of a report by him, the court on April 5, 1929, entered a decree of foreclosure. The court found that defendant, Theodore Ebert & Co., had a first lien on the premises for $684.69; that complainant had a second lien for $6,863.42, and $750 for solicitor's fees; that subordinate thereto the Sheridan Co. had liens in the respective amounts of $584.34 and $868.93 by virtue of two judgments owned by it; and that the claims of Fred C. Bracken as assignee of

Hugo Westerdahl, did not constitute liens.

Accompanying the master's report, filed November 16, 1928, is the affidavit of William J. Cleary, a stenographer and court reporter, to the effect that his office reported and transcribed the testimony taken in the cause, and that for such services he is entitled to the sum of $348.30, which is the usual and a reasonable charge therefor; also there is the master's certificate of fees and charges for his services, as follows:

"Fees allowed by statute:

Taking and certifying 1887 folios of testimony at 15¢ per folio	$281.55
Fees to be fixed by the court:	
Obtaining files, examining order of reference, docketing case, setting same for hearing, reading and considering pleadings and testimony, and preparing report and authorities, over fifty (50) hours	250.00
To fee for over ten (10) hours of argument	50.00
To fee for sending out draft of report and closing down same, five (5) hours	25.00
Total -	$606.55"

On the same day, November 16, 1928, the court entered a draft order in which it is stated that it was necessary to employ a stenographer in the taking and transcribing of the evidence before the master. And the court expressly approved said master's and stenographer's charges, aggregating $954.85, and ordered that they "be fixed as costs, - the court reserving the question of taxing the same against the respective parties before the determination." This question was referred, apparently, to the master for a report and on April 5, 1929, he filed a report. The exceptions of the Sheridan Co. thereto were overruled. The report is as follows:

[illegible] considered, she not constitute items.

Accompanying the monthly reports, filed by Mrs. [illegible], 1958, is the affidavit of William [illegible] Jerry, a stenographer and court reporter, [illegible] office supported and transcribed the testimony taken in the cause, and [illegible] such services he is entitled to [illegible] of [illegible], which is the usual and customary charge [illegible] in the county, as the court's certificate of [illegible] for [illegible] services, as follows:

Taking and certifying last [illegible] of testimony at 10¢ per folio	[illegible]
Time to be taken by the court:	
Obtaining files, examining cover of [illegible], [illegible] case, setting case for hearing, reading and considering pleadings and [illegible], and preparing [illegible] order, [illegible] (50) hours	[illegible]
To [illegible] for [illegible] (10) hours at [illegible]	[illegible]
To [illegible] and draft of [illegible] and closing [illegible] (5) hours	[illegible]
Total -	[illegible]

[illegible] a lack [illegible] in which it is [illegible] to be [illegible] a stenographer in the [illegible] the [illegible] before the [illegible] and stenographer's charges, [illegible] they "be fixed as costs, [illegible] the question of taking the case against [illegible] before the determination." [illegible] for a [illegible] of the [illegible] follows:

"DISTRIBUTION OF MASTER'S FEES.

Charge to	Folios of Testimony	Folios of Exhibits	Total Folios
Bracken	627	14	641
Sheridan	366	..	366
Levinkind	600	270	870
	1,593	284	1,877

Fee for argument, report, etc..... $325.00
Divided by three is for each of above $108.33
Making Levinkind:
870 folios @ 15¢ per folio $130.50
1/3 of argument, etc..... 108.33
Stenographer's charges 131.47
Total..... $370.30

Making Bracken:
641 folios @ 15¢ per folio 96.15
1/3 of argument, etc..... 108.33
Stenographer's charges 137.10
$341.58

Making Sheridan:
366 folios @ 15¢ per folio 54.90
1/3 of argument, etc..... 108.33
Stenographer's charges 79.37
Total..... $242.96"

In the final decree of April 5, 1929, the court ordered that, unless the said sum of $684.69, and interest, be paid to Theodore Ebert & Co., and the said sum of $6863.42, with interest, be paid to complainant, within two days, and also the costs of this suit, "including said fees for complainant's solicitors, and master's fees and stenographer's charges on the reference herein, which are hereby taxed at the sum of $954.85," the premises be sold, etc. And the court further ordered and adjudged that "the sum of $243, cost of reference, which includes the proportion of stenographic services incurred by the assertion of its claims by the Sheridan Co. and a proportionate part of the master's fees and expense, incurred by the assertion of its rights by said Sheridan Co., be paid to complainant by said Sheridan Co. (it appearing that said complainant has paid and advanced <u>all</u> of the costs of reference); and that, in case of the failure of said Sheridan Co. to pay to said complainant the said sum of $243, so taxed against it as the fair porportion of the costs, the said complainant, Morris

"ILLUSTRATION OF MARTIN'S CASE.

Charge to	Policies of Testimony	Policies of Exhibits	Total Policies
Brandon	600	14	614
Sheridan	386	..	386
Levinsing	400	470	870
	1,386	484	1,870

Fee for argument, report, etc. $23.00
Divided by three is for each of above 7.67
Making Levinsing's:
870 folios - 10¢ per folio $87.00
1/3 of argument, etc. 7.67
Stenographer's charges 11.67
Total $106.34

Making Brandon:
614 folios - 10¢ per folio $61.40
1/3 of argument, etc. 7.67
Stenographer's charges 11.67
$80.74

Making Sheridan:
386 folios - 10¢ per folio $38.60
1/3 of argument, etc. 7.67
Stenographer's charges 11.67
Total ..... $57.94"

In the final decree of April 6, 1909, the court ordered that, unless the said sum of $[illegible], and interest, be paid to Theodore Albert & Co., and the said sum of $[illegible]-42, with interest, be paid to complainant, within two days, and also the costs of the suit, "including said fees for complainant's solicitors, and master's fees and stenographer's charges as the reference proceed, which are hereby taxed at the sum of $[illegible]," the premises be sold, etc. and the court further ordered and adjudged that " to sum of $[illegible], cost of reference, which is under the jurisdiction of stenographic services incurred by the association of all claims by the [illegible] Co., and a proportionate part of the master's fees and expense, incurred by the association of his [illegible] by [illegible] etc., to be paid to complainant by said [illegible] [illegible] said complainant has paid and assumed $[illegible] of the [illegible] and that, in case of the failure of said [illegible] said complainant the said sum of [illegible], so [illegible] fair proportion of the costs, the said complainant [illegible]

Levinkind, have execution therefor against said Sheridan Co."

On the same day (April 5, 1929) the court allowed an appeal by the Sheridan Co. to this appellate court from "that part of the order and decree of April 5, 1929, which decrees that complainant recover the sum of $242.96 from the Sheridan Co. for costs assessed against said Sheridan Co.," - bond of $500 to be filed within 30 days and bill of exceptions within 60 days. Within the required times the Sheridan Co. filed its bond, and also a bill of exceptions signed by the judge. The bill of exceptions discloses that the Sheridan Co. made two motions to re-tax the costs, - one on November 16, 1928, when the master's and stenographer's charges, aggregating $954.85, were fixed as costs, and the other on the day said final decree was entered.

The statute relative to fees of masters in chancery, in force when said final decree was entered (Cahill's Stat. 1927, Chap. 53, Sec. 20, p. 1267) is in part as follows:

> "For taking depositions and certifying, for every one hundred words, fifteen cents. For taking and reporting testimony under order of court, the same fee as for taking depositions. * * In all counties hereafter masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, * * such compensation as the court may deem just; and for services not enumerated above in this section and which has (have) been and may be imposed by statute or special order, they may receive such compensation as the court may allow. The court may <u>also</u> include as a part of such master's fees a reasonable allowance not to exceed fifteen cents per hundred words for stenographer's services in cases where the master shall certify that a stenographer was necessarily employed, and shall attach to his report a certified copy of the testimony taken by such stenographer."

Counsel for the Sheridan Co., first contend that the taxing as costs of $348.30 for the stenographic services is excessive, inasmuch as there were only 1877 folios, which at the statutory rate of 15 cents per folio amount to only $281.55; and that in the subsequent apportionment made as to these costs to be paid by the Sheridan Co., viz., $79.37, this amount is excessive to the extent of $24.47, and

Levinsohn, here a question therefore remained only whether Dorfman Co.'s

On the same day (April 9, 1970) the court allowed an appeal by the Dorfman Co. to amend application so as to include that part of the order and the [illegible] April 8, 1970, which concerned that complainant recover also [illegible] from the defendant Co. for costs assessed against [illegible] - leave of [illegible] to be filed within 30 days and bill of exceptions within 60 days. Again the required times the Dorfman Co. filed its bond, and also a bill of exceptions signed by the judge. The bill of exceptions disclosed that the Dorfman Co. made the motion to re-tax the costs, - on November 18, 1969, upon the [illegible] "Photographer's charges" on ground [illegible] 1968-69, more than one year, and the other on the day said final decree was entered.

The statute relating to time as matter in controversy, in force when said final decree was entered (Ventnor's Ann. 1957, Comp. Sta. Ann., 2A:15-5) is in part as follows:

> "For taking depositions and stenography, per every one hundred words, fifteen cents. For taking and reporting testimony under order of court, the same fee as for taking depositions. * * In all courts [illegible] allowed in stenography per diem for attending sessions in terms adjourned to them. And reporting proceedings [illegible] such compensation as the court may fix, just and fair [illegible] (have) been and may be imposed or assessed or specified [illegible] they may receive such [illegible] The court may allow [illegible] a part of such expert's fees a reasonable allowance not to exceed [illegible] such [illegible] for economic [illegible] small certify that a [illegible] and if it appears to the [illegible] testimony taken by such stenographer."

Counsel for the Dorfman Co. [illegible] as costs of 1968-69 for the stenographer [illegible] much as there were only 1970 folio [illegible] of the stenography [illegible] 10 cents per folio account. [illegible] appeal-counsel were [illegible] viz., 1968-69, this amount is more than [illegible] and

for the reason that there were only 366 folios of "Sheridan testimony" taken, which at said statutory rate amounts to only $54.90. We think that the contention has merit.

Counsel for the Sheridan Co. also contend that the items of $250, $50 and $25 (aggregating $325 for 65 hours of claimed extra time expended at $5 per hour) as contained in the master's certificate of fees and charges above set out, and allowed by the court in said final decree, are excessive and improper. Considering the item of $281.55, as properly charged by the master and confirmed by the court, we are of the opinion that said aggregate charge of $325 must be considered as excessive, in view of numerous decisions of our Supreme Court. (See, Schnadt v. Davis, 185 Ill. 476, 485, et seq.; Manowsky v. Stephen, 233 id. 409, 415-16; Klekamp v. Klekamp, 275 id. 98, 107-8; Rasch v. Rasch, 276 id. 261, 273-4; Herpich v. Williams, 300 id. 540, 548-50; Kuehnle v. Augustin, 333 id. 31, 39-41.) We think that a reasonable charge for all of the services enumerated in said items would be $150. One third of said $150 is $50; and, therefore, in the apportionment there can properly be charged against the Sheridan Co. $54.90, $50 and $54.90, or a total of $159.80, instead of $242.96, as charged by the master and allowed by the court. And the final decree appealed from should be modified accordingly.

And we do not think that there is any merit in complainant's motion to strike the bill of exceptions of the Sheridan Co. and to dismiss its appeal. The bill of exceptions was presented to and signed by the judge within the time required, and discloses that the Sheridan Co. twice objected to the master's charges, taxed as costs, and moved the court to re-tax the costs, which motions were denied. Even though these objections and motions had not been made in the court below, the question whether the amounts taxed as costs in said final decree against the Sheridan Co. could properly be considered

for the reason that there were only 300 folios of " Jacobian testimony" taken, which at said stenography rate amounts to only $64.50. We think that the contention has merit.

Counsel for the Jacobian Co. also contend that the items of $3250, 680 and $58 (representing $325 for 65 hours of claimed extra time expended at $5 per hour) as contained in the master's certificate of fees and charges above set out, and allowed by the court in said final decree, are excessive and improper. Considering the item of $325.55, as properly charged by the master and confirmed by the court, we are of the opinion that said aggregate charge of $325 must be considered as excessive, in view of numerous decisions of our supreme Court. (See, Lennard v. Davis, 125 Ill. 272, 285, et seq.; Lennard v. Lenghan, 242 id. 409, 414-16; Clarke v. Clarke, 275 id. 94, 107-8; Brach v. Lesch, 292 id. 61, 272-4; Herpich v. Williams, 30 id. 560, 568-9; Hopkins v. Hopkins, 333 id. 31, 39-41.) We think that a reasonable charge for all of the services enumerated in said item would be $150. One third of said $150 is $50; and, therefore, in the apportionment there can properly be charged against the Jacobian Co. $54.50, $58 and $58.50, or a total of $170.50, instead of $325.55, as charged by the master and allowed by the court. And the final decree rendered from should be modified accordingly.

And we do not think that there is any merit in complainant's motion to strike the bill of exceptions of the Jacobian Co. and to dismiss its appeal. The bill of exceptions was presented to and signed by the judge within the time required, and it appears that the Jacobian Co. twice objected to the master's charges, taxed as costs, and moved the court to re-tax the costs, which motions were denied. Even though these objections and motions had not been made in the court below, the question whether the amount taken as stated in said final decree against the Jacobian Co. could properly be considered

on this appeal. (Keuper v. Mette, 239 Ill. 586, 594.)

For the reasons indicated that portion of the decree appealed from, wherein the Sheridan Co. is required to pay to complainant $243 of the costs as taxed, is reversed, and the cause is remanded to the circuit court with directions to so modify said decree that the amount of costs to be paid by the Sheridan Co. to complainant is $159.80, instead of $243. The costs in this appellate court will be taxed against the appellee, Levinkind.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Scanlan, J., concur.

on this appeal. (Bunger v. Kelly, 189 Ill. App. 254.)

For the reasons indicated that portion of the decree appealed from, wherein the Sheridan Co. is required to pay to complainant fees of the costs as taxed, is reversed, and the cause is remanded to the circuit court with directions to modify such decree that the amount of costs to be paid by the Sheridan Co. to complainant is $150.00, instead of $250. The costs in this appellate court will be taxed against the appellee, Levinkind.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Scanlan, J., concur.

53633

255 I.A. 618

BRIDGET MOONEY,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The Yellow Cab Company prosecutes this appeal from a judgment for $12,500, rendered against it after verdict by the superior court of Cook county in an action for damages for personal injuries received by plaintiff on the night of June 16, 1927, while she was riding as a passenger in one of its taxi-cabs. Harry Nathan was made a co-defendant with the cab company but as to him the jury returned a verdict of not guilty.

Plaintiff's declaration consisted of four counts. In the first it is alleged that on the night mentioned (about 11:30 p. m.) plaintiff was a passenger in a taxi-cab owned and operated by the cab company; that the driver was driving the cab in an easterly direction on Lexington street in Chicago and was attempting to cross the intersection of that street with Sacramento Boulevard, a north and south boulevard; that Harry Nathan was driving his automobile northerly in the boulevard and was attempting to cross the intersection; that defendants so negligently drove and operated the respective automobiles that they collided in the intersection; and that thereby plaintiff, who at all times was in the exercise of due care for her own safety, was seriously and permanently injured. The second count in somewhat different language charged defendants with negligence, generally, in the operation of the automobiles.

33023

MILDRY MOONEY,
Appellee,

v.

YELLOW CAB COMPANY,
a corporation,
Appellant;

APPEAL FROM DOUGLAS COUNTY,
COOK COUNTY.

MR. JUSTICE SMALLEY DELIVERED THE OPINION OF THE COURT.

The Yellow Cab Company prosecutes this appeal from a judgment for $12,000, rendered against it after verdict by the superior court of Cook county in an action for damages for personal injuries received by plaintiff on the night of June 14, 1927, while she was riding as a passenger in one of its taxi-cabs. Henry Bielman was made a co-defendant with the cab company but as to him the jury returned a verdict of not guilty.

Plaintiff's contention, summarized of course, is that the night in alleged that on the night mentioned (about 11:30 p. m.) plaintiff was a passenger in a taxi-cab owned and operated by the cab company; that the driver was drivin the cab in an unsafe direction on Douglas street in Cook county and was attempting to cross the intersection of that street with Ashland boulevard, a north and south boulevard; that Henry Bielman was driving his automobile northerly in the Ashland and was attempting to cross the intersection, that defendant's negligently drove and operated the respective automobiles and drove collided in the intersection; and that thereby plaintiff, who was a passenger in the taxicab of one cars for hire and was injured, was seriously and permanently injured. The second count is somewhat different, at language charging defendant with negligence generally, as the operation of the automobile

The third charged that defendants negligently drove the respective automobiles at excessive rates of speed in violation of the statute. In the fourth count it is alleged that Sacramento Boulevard at Lexington street was a designated street for preferential traffic and that all vehicles, before entering into or crossing the boulevard, were required to come to a stop; that the driver of the cab before entering the intersection did not stop it but negligently kept on going across the intersection; and that in consequence thereof, together with the failure of Nathan to exercise ordinary care under the circumstances, the collision occurred causing plaintiff's injuries.

The cab company and Nathan filed separate pleas of the general issue, and the cab company a special plea denying possession or control of the particular taxi-cab.

On the trial plaintiff, to meet the defense of the cab company as made in its special plea, called as her first witness the driver of the cab, Alfred Fogstad. He testified that at the time of the accident he was employed by the cab company to drive the particular cab and that plaintiff was then a passenger in it. Upon being further asked on direct examination to state how far away from him was the other automobile when he first noticed it, he volunteered the statement that he first saw it when he was "at a stop" (objected to by plaintiff's attorney as not responsive) and then answered the question by stating that when he first saw the automobile "it was approximately 300 or 350 feet away, was going about 30 to 33 miles an hour, and was going that fast when the collision occurred." On cross-examination by the attorney for Nathan, he testified that "I saw the other car all the time while I was crossing;" that it was to "my right;" that "when I was about half way across the boulevard he was perhaps 125 to 150 feet away from me;" and that "at the time I was struck I was going probably about five miles an hour." On

The third element that determines negligence is the respective automobiles or mechanical [illegible] used in violation of the statute.

In the fourth count, it is alleged [illegible] defendant, Bankington street was a dangerous street for pedestrians, [illegible] and that all vehicles, before entering into or crossing the [illegible], were required to come to a stop [illegible] the driver of the cab before entering the intersection [illegible] it but negligently kept on going across the intersection [illegible] in a manner [illegible] together with the [illegible] of [illegible] to exercise ordinary care under the circumstances, the collision occurred and the plaintiff's injuries.

The two companies and Nelson filed separate pleas of the general issue, and the cab company a special plea [illegible] or control of the [illegible].

At the trial [illegible], [illegible] of the cab company [illegible] made in the [illegible] plea, [illegible] the driver of the cab, [illegible] of the [illegible] at the time of the accident [illegible] the [illegible] the plaintiff being further cab [illegible] been a passenger in [illegible] being further asked on direct examination to [illegible] for any [illegible] him was the other [illegible] [illegible] the [illegible] the [illegible] to by plaintiff's attorney as [illegible] [illegible] question by [illegible] approximately [illegible] an hour, [illegible] cross-examination by [illegible] [illegible] to "my right" [illegible] he was perhaps [illegible] I was [illegible] [illegible]

cross-examination by the attorney for the cab company he testified: "At the time the other car hit me, the front wheels of my car were past the east curb of the boulevard; * * my car slid around to the north side of Lexington street, hitting the north curb of Lexington street with the rear left wheel; I was about in the center of the right half of Lexington street at the time my car was hit; * * when my car came to a standstill it was east of Sacramento Boulevard."

Plaintiff, testifying in her own behalf, stated that after attending a theater with her daughter, Fansy Mooney, they boarded the cab at Kedzie avenue and Madison street, instructing the driver to take them to their home at 2918 Lexington street, which is a short distance east of Sacramento Boulevard; that plaintiff occupied a seat inside on the north or left side of the cab and her daughter a seat at her right; that when the cab, going east on Lexington street, reached the boulevard it did not stop; that as it was crossing the boulevard plaintiff did not notice any automobile entering the intersection from the south; that suddenly the cab was hit on its right side by another automobile and there was a crash and she lost consciousness; that when she recovered consciousness she was still in the cab; and that afterwards she was taken to the Robert Burns Hospital where she received treatment and an X-ray picture of her shoulder was taken during that night.

Plaintiff's daughter testified on direct examination that she was familiar with the intersection and its surroundings; that there were boulevard stop signs there, - permanent red lights with the word "Stop;" that the cab did not stop before entering the boulevard intersection; that while it was in the intersection there suddenly was a crash and she became unconscious; that she was awakened by hearing her mother's cries, while they were still in the cab; that she noticed that the glass on the right side of the cab was

cross-examination by the attorney for the cab company he testified: "At the time the other car hit me, the front wheels of my car were past the east curb of the boulevard; " " my car will around to the north side of Lexington street, missing the north curb of Lexington street with the rear left wheel; I was about in the center of the right half of Lexington street at the time my car was hit; " " when my car came to a stop, still it was east of Vermonte Boulevard."

Plaintiff, testifying in her own behalf, stated that after attending a theater with her daughter, Fanny Lowney, they boarded the cab at Hoover avenue and Madison street, instructing the driver to take them to their home at 2812 Lexington street, which is a short distance east of Vermonte Boulevard; that plaintiff occupied a seat inside on the north or left side of the cab and her daughter a seat at her right; that when the cab, going east on Lexington street, reached the Boulevard it did not stop; that as it was crossing the Boulevard plaintiff did not notice any automobile entering the intersection from the south; that suddenly the cab was hit on the right side by another automobile and there was a crash and she lost consciousness; that when she recovered consciousness she was still in the cab; and that afterwards she was taken to the Hope of Burns Hospital where she received treatment and an x-ray picture of her shoulder was taken during that night.

Plaintiff's daughter testified on direct examination that she was familiar with the intersection and its surroundings; that there were Boulevard stop signs there, - permanent red lights with the word "Stop"; that the cab did not stop before entering the Boulevard intersection; that while it was in the intersection there suddenly was a crash and the horror automobiles; that the cab swerved by hearing her mother's cries, while they were still in the cab; that she noticed that the glass on the right side of the cab was

broken; and that she and her mother were taken in another cab to the hospital where both received treatment. On cross-examination she further testified that the next morning, while she and her mother were in nearby beds in the same ward in the hospital, a Mr. Murphy called and asked for information as to the accident; that she gave him an account of it and he wrote it down in the form of a statement and then read it to her; that she then at his request signed it, but did not read it; that she told him the cab did not stop before entering the intersection and that it was struck by the other automobile in the intersection; and that at the time of his call her mother (plaintiff) did not speak to him and he did not read the statement to her (plaintiff) or talk to her about the accident.

Robert E. Goldenberg, plaintiff's witness, testified that he was driving his automobile, the second car behind Nathan's, north on the boulevard; that he noticed that the yellow cab upon reaching the intersection from the west did not stop; that, proceeding easterly with undiminished speed of about 25 miles an hour, it ran right in front of Nathan's car, which struck it near its center; and that the cab "was thrown against the northeast curb and remained upright."

Henry Nathan, testifying in his own behalf, stated that he approached and entered the intersection at a speed of about 15 or 20 miles an hour; that he first noticed the cab, attempting to pass in front of him, when it was about 10 feet away and to his left; that he quickly applied his brakes and, though the cab swerved a little to the north, he could not avoid hitting it; and that there was a boulevard stop sign on the southwest corner of the intersection.

The cab company did not call any witness to the accident. Two police officers, who went to the scene of the accident and afterwards to the hospital to make investigations, testified for it, as

did also Charles Fuller and Thomas V. Murphy, two of its investigators. Murphy testified as to the procuring of the signed statement as to the accident from plaintiff's daughter, on the morning following, at the hospital. This paper, introduced in evidence, contained statements that "at Sacramento boulevard the cab stopped and started slowly crossing the boulevard; that when we were nearly over the north drive of the boulevard a northbound auto, travelling very fast, ran directly into the center of our cab; * * that my mother's collar bone was fractured and her back injured." In rebuttal, plaintiff's daughter testified that it was not true that the cab stopped at the boulevard before entering it, that she did not so state to Murphy, and that when Murphy read over the statement to her, before she signed it, he "did not read that it stopped at the boulevard."

Counsel for the cab company first contend that plaintiff cannot recover because the evidence does not affirmatively show that she was in the exercise of ordinary care at the time. The argument is in substance that she, a passenger inside the cab, should have noticed that the driver did not stop before entering the boulevard; also, that she should have noticed the other automobile approaching the intersection from the right; that she should have warned the driver of the danger; and that she was negligent in not so doing. There is no merit in the contention or argument. (Hoffman v. Yellow Cab Co., 238 Ill. App. 269, 270-1; Hickey v. Chicago City Ry. Co., 148 Ill. App. 197, 209-10; Heitz v. Yellow Cab Co., 248 Ill. App. 287, 291; Metz v. Yellow Cab Co., 248 Ill. App. 609,614-15.)

Counsel also contend that the verdict against the cab company on the question of the negligence of the driver of the cab is not sustained by a preponderance of the evidence. We cannot agree with the contention. On the contrary we think that the evi-

did also describe Murphy and Inmates v. Murphy, one of its investigators. Murphy testifies as to the procuring of the signed statement as to the accident from plaintiff's daughter, on the morning following, at the hospital. This payee, interposed in evidence, contains statements that "at Commonwealth Dairyland the cab stopped and started slowly crossing the boulevard; that when we were nearly over the north drive of the Conservatory a northbound cab, travelling very fast, ran directly into the center of our cab; * * that my mother's collar bone was fractured and her back injured." In rebuttal, plaintiff's daughter testifies that it was not true that a cab cab stopped [illegible] the boulevard before entering it, that she did not so state to Murphy, and that when Murphy read over the statement to her, before she signed it, he "did not read that it stopped at the boulevard."

Counsel for the cab company first contends that plaintiff cannot recover because the evidence does not affirmatively show that she was in the exercise of ordinary care at the time. The argument is in substance that's use, a passenger inside the cab, should have noticed that the driver did not stop before entering the boulevard; that she should have realized [illegible] other automobiles approaching the intersection from the right; that she should have warned the driver of the danger; and that she was negligent in not so doing. There is no merit in the contention or argument. (Mulkins v. Yellow Cab Co., 326 Ill. App. 349, 370-1; Hilker v. Chicago City Ry. Co., 144 Ill. App. 197, 202-203; Kelly v. [illegible], 248 Ill. App. 280, 2821; Kelly v. Yellow [illegible], 248 Ill. App. [illegible]).

Counsel also contend that the trial judge [illegible] the cab company on the question of the negligence [illegible] of the cab is not sustained by a preponderance of the evidence. [illegible] agree with the contention. On the contrary we think that the evi-

dence clearly shows that the driver of the cab was guilty of negligence, first, in not bringing his cab to a stop before entering the boulevard intersection and, second, after having entered it, in attempting to cross it in front of the other automobile, which he saw was entering the intersection and approaching from his right. Even if it could be believed that the driver of the cab did bring it to a stop before entering the intersection it is clear that his negligence, in attempting to pass in front of Nathan's car, which he says he saw "all the time" and which had the right of way, proximately caused the accident.

Counsel also contend that the court erred in allowing Dr. Graham, plaintiff's witness and the family physician, after he had testified to certain existing conditions as to plaintiff's shoulder and back observed during many treatments after she had left the hospital, to further testify that in his opinion those conditions were permanent. In view of all the medical testimony introduced, including that of the cab company's witness, Dr. Blaine, and other testimony, we do not think that the admission of the testimony complained of constituted reversible error. Nor do we think that the admission of certain testimony of plaintiff's expert medical witness, Dr. Scott, relative to the limitation of motion of one of plaintiff's arms which he had observed on a test, was error, for the reason, as contended, that such apparent limitation could partially be controlled by acts of the patient, and that the symptoms and conditions mentioned were of a subjective rather than an objective character.

Counsel also contend that the court erred in giving to the jury instruction No. 6, offered by plaintiff, which told them that, while she must prove her case by a preponderance of the evidence, "still the proof need not be the direct evidence of persons who know the facts or things sought to be proved," but that "facts

[illegible]

may also be proved by circumstantial evidence," etc. The argument is that "there was not any circumstantial evidence in the case tending to prove any fact in it," and that hence the giving of the instruction was error. We do not think there is any merit in the contention or argument, because, as we read the record, there was much evidence which may be deemed circumstantial. Furthermore the instruction, in substantially the same language, has frequently been approved by our Supreme Court. (See U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 535.)

Counsel also contend that the verdict of $12,500 is so excessive as to indicate that it was the result of passion or prejudice. We do not think so. Plaintiff was rendered unconscious for a few moments after the collision. While in the hospital about two hours later she vomited and then and thereafter suffered from headaches and pains in her shoulder and back. She was in bed at the hospital for about two weeks, when she was conveyed to her home and remained in bed there for an additional two weeks. While in the hospital she was treated by Dr. Boland, resident physician there. He testified that there were many bruises on the body, bruises about the head with evidence of concussion, a wrenched and sprained shoulder, and a fractured collar bone. The charges of the hospital, including physician's fees and X-ray pictures taken, were $400. Dr. Graham testified that he treated her at her home from July 8 to November 2, 1927, making 28 calls in all; that she complained of dizzy spells and pains in the head and back; that she was in bed part of the time; that the restriction of the motion of her arm was about one-half; that there was tenderness upon pressure in the back and along the spinal column; and that these conditions were present when he ceased treating her. Dr. Scott testified that he took X-ray pictures of her head, right shoulder and lumbar spine in October, 1928; that the

may also be proved by circumstantial evidence," etc. The argument is that "there was not any circumstantial evidence in the case tending to prove any fact in issue," and [illegible] the instruction was error. [illegible] instruction merit in the construction or language, however, [illegible] there was much evidence which may be deemed circumstantial. Sufficiency of the instruction, in substantially the same language, was frequently upheld by our appellate court. See [illegible] v. [illegible], 211 Ill. 631, 636.)

Counsel also contend [illegible] of [illegible] is no [illegible] in [illegible] of [illegible] of [illegible] dice. [illegible] not which [illegible] a few minutes after our coming. [illegible] two hours later [illegible] head [illegible] the hospital for [illegible] and [illegible] the hospital! [illegible] He testified in [illegible] the [illegible] and a [illegible] physicians' [illegible] testified [illegible] 1927, taking [illegible] the [illegible] pain in the head and [illegible] that the [illegible] that there [illegible] spinal [illegible] treating her. [illegible] head, right [illegible]

X-ray pictures of her skull showed "a V-shaped fissured fracture line;" that the picture of the shoulder showed "the collar bone fractured at the junction of its middle and outer thirds, with the inner end of the outer fragment displaced downward, and riding under the other fragments, of approximately one inch;" that while the picture of the "small of the back" does not show any fracture there, it indicates a "condition of rarification and absorption;" that at the same time, by physical examination of the patient, he could feel deformities of the right collar bone or clavicle; that by palpating or moving the right arm he "was unable to get the arm any higher than approximately at a right angle;" and that this condition was caused by the "changes in the shoulder joint and the overriding and shortening of the collar bone of approximately an inch." Plaintiff, 61 years of age, testified on the trial in January, 1929, that she still was troubled with dizziness and pains in her head, so much so that frequently she had to "grab something to keep on my feet;" that before the accident she never had any sickness or any limitation in the movement of her arm, but that now she cannot raise it; and that before the accident she did much of the housework, except the washing, and that now she cannot perform housework. As to her present inability to perform housework she was corroborated by the testimony of her daughter. In view of this testimony as to her injuries, suffering and present disabilities, all resulting from the accident, and also considering the present purchasing value of the dollar, we are unable to say that the jury's verdict is excessive.

Complaint also is made of a certain remark (stricken out by the court) made by plaintiff's attorney in his opening statement to the jury and also of other remarks made by him in his arguments to the jury after all the evidence had been heard. The argument is that these remarks prejudiced the jury against defendant and accounted for the

X-ray pictures of her skull showed 'V-shaped fissure fracture lines;' that the picture of the shoulder showed the collar bone fractured at the junction of the middle and outer thirds, with the inner end of the outer fragment displaced outward, and riding under the other fragment approximately one inch;' that while the picture of the [illegible] of the skull does not show any fracture there, it indicates a 'condition of [illegible];' that at the same time, by physical examination of the patient, he could feel deformities of the right collar bone or clavicle; that by palpating or moving the right arm he 'was unable to [illegible] the arm any higher than approximately to a right angle;' and that this condition was caused by the [illegible] joint [illegible] overriding and displacement of the [illegible] of approximately an inch." Plaintiff [illegible] lady, [illegible] head, as much as [illegible] on my feet; [illegible] or any limitation in the [illegible] takes it; [illegible] except [illegible] to her [illegible] by the [illegible] her injuries, [illegible] from the [illegible] of [illegible]

[illegible]

The court [illegible] by [illegible] the jury [illegible] jury [illegible] remains [illegible]

claimed excessive verdict. Holding, as we do, that the verdict is not excessive we cannot say that the remarks, though some of them may be considered improper, constitute such prejudicial error as warrants a reversal of the judgment. On the entire record we think that the verdict and judgment do substantial justice between the parties.

The judgment of the superior court should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

claimed excessive variation. Although, as we saw, such an variation is not excessive as compared with the [illegible] [illegible] claim may be considered improper, conditions such [illegible] error in variable a return of the judgment [illegible] record as shows that the action and judgment [illegible] justice between the parties.

The judgment of the [illegible] court should be affirmed and it is so ordered.

[illegible]

Burnett, J. dissents. [illegible]

33663

4 6a

255 I.A. 618

JACK BRUSK,
Defendant in Error,

v.

IRVING ROYACK, L. AFREMOW,
MAX GELTNER and E. M. COFFMAN,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ plaintiffs in error seek to reverse a judgment for $5324, entered against them on October 27, 1928, after verdict in the municipal court of Chicago. Shortly after the issuance of the writ the appearance of defendant in error was entered by the same firm of attorneys who had instituted the original suit for him in the municipal court, but no brief has here been filed in his behalf.

The original suit, commenced on November 22, 1926, was against plaintiffs in error and two others, Arthur F. Krone and Chester W. Krone, as endorsers upon two promissory notes, each for $2500, and dated respectively at Miami, Florida, March 25th and April 5th, 1926; each signed by Kissimmee Lake Developers, Inc., by two of its officers; and each payable ninety days after date to the order of plaintiff at Miami Bank and Trust Co., with interest at 8 per cent per annum after date. In the body of each note is the clause that "the maker and endorser of this note jointly and severally further agrees to waive demand, notice of non-payment, and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection." Four of the endorsers (plaintiffs in error) were duly served with process and filed affidavits of merits, but the two Krones were not served.

35605

JACK SHURK,
Defendant in error,

v.

IRVING KROMER, et al.,
MAX BRITTON and T. A. [illegible],
Plaintiffs in error.

[illegible] DENIED.

[illegible] ORDER OF THE COURT.

By this writ plaintiffs in error seek to review a judgment for $2324, entered against them on October 29, 1929, after verdict in the municipal court of Chicago. Shortly after the issuance of the writ the appearance of defendants in error was entered by the same firm of attorneys who had instituted the original suit for them in the municipal court, but no brief for them appears filed in this court.

The original suit, commenced on November 26, 1928, was against plaintiffs in error and one others, namely, Irving I. Kromer and Chester F. Kromer, on executors upon two promissory notes, each for $2500, and dated respectively 11 March, 1926, and 20 April 5th, 1926; each signed by Kingsmore Sales Corporation, by two of its officers and each payable ninety days after date to the order of plaintiffs at Miami Bank and Trust Co., with interest [illegible] per annum after date. In the body of each note in the phrase "the maker and endorsers of this note jointly and severally waive agree to give demand, notice of non-payment, and to [illegible] shall be bound for the collection hereof, or the same [illegible] be obtained upon demand of an attorney, to pay [illegible] making such collection." Four of the defendants, plaintiffs in error were duly served with process and filed a [illegible] of motion, but the two Kromer were not served.

In plaintiff's statement of claim, after stating the execution and delivery of the notes at Miami, Florida, he alleged that defendants' signatures as endorsers were on the back of each note when delivered to him; that the maker did not pay them when due, although each was presented for payment at said bank on the due date; that defendants waived the necessity of demand upon the maker and notice to defendants of the fact of the non-payment by the maker; that prior to the commencement of this suit defendants paid to plaintiff $600 on the principal sums due; and that the balance of the principal sums is now due to him, together with accrued interest.

In Royack's affidavit of merits, while admitting that he endorsed the notes, he alleged that they "were deposited with plaintiff upon the express conditions that Abraham Jaffe and Frank Messer were also to endorse said notes and become jointly liable with this defendant and others on said notes," and that, in the event said Jaffe and Messer failed to endorse them, the same "were to be cancelled and destroyed;" that Jaffe and Messer did not endorse them; that this defendant has no knowledge of their delivery to plaintiff, or that $600, or any sum, was paid to him on account; and that this defendant is not indebted to plaintiff in any sum.

Afremow's affidavit of merits, filed May 7, 1927, is substantially to the same effect.

In the amended affidavit of merits of Coffman and Geltner, filed October 18, 1928, they admitted the execution of the notes and their respective endorsements thereon; stated that they had no knowledge that the notes had been presented for payment or that the maker had not paid them; and denied that they had ever waived notice of non-payment by the maker, or that $600 had been paid by them, or that they had ever otherwise recognized any liability upon the notes. They further alleged that plaintiff and one Sam Goldman were sales agents of said corporation, Kissimmee Lake Developers, under the arrangement

In plaintiff's statement of claim, after stating the execution and delivery of the notes at Miami, Florida, he alleged that defendants' signatures as endorsers were on the back of each note when delivered to him; that the maker did not pay them when due, although each was presented for payment at said bank on the due date; that defendants waived the necessity of demand upon the maker and notice to defendants of the fact of the non-payment by the maker; that prior to the commencement of this suit defendants paid to plaintiff $[illegible] on the principal sums due; and that the balance of the principal sums is now due to him, together with accrued interest.

In Bogren's affidavit of merits, while admitting that he endorsed the notes, he alleged that they "were deposited with plaintiff upon the express conditions that Graham Taffe and Frank Beaver were also to endorse said notes and become jointly liable with this defendant and sharers on said notes," and that, in the event said Taffe and Beaver failed to endorse them, the same "were to be cancelled and destroyed;" that Taffe and Beaver did not endorse them; that this defendant has no knowledge of their delivery to plaintiff, or that $800, or any sum, was paid to him on account and that this defendant is not indebted to plaintiff in any sum.

Freeman's affidavit of merits, filed May 7, 1957, is substantially to the same effect.

In the remaining affidavit of merits of Goldman and Gardner, filed October 18, 1958, they admitted the execution of the notes and their respective endorsements thereon; stated that they had no knowledge that the notes had been presented for payment or that the maker had not paid them; and denied that they had ever received notice of non-payment by the maker, or that $800 had been paid by them, or that they had ever otherwise recognized any liability upon the notes. They further alleged that plaintiff and one Goldman were joint agents of said corporation, Harlwood Land Developers, under the arrangement

that, as to all sales made by them of the subdivided land owned by it, said corporation was to receive 55%, and plaintiff and Goldman were to receive 45%; that plaintiff and Goldman desired an advancement to them by the corporation of $5,000, with the further understanding that repayment of the sum should be made out of the first moneys received from sales of said land; that the stockholders of the corporation consisted of Coffman, Geltner, Afremow, the Krones, Abraham Jaffe and Frank Messer; that it was agreed with plaintiff that, if the corporation would execute the notes, said stockholders would endorse the same, and that plaintiff was to secure the endorsement on the notes of all of said stockholders, including Jaffe and Messer, and that if the endorsements of all were not procured the notes should be cancelled; that plaintiff failed to secure the endorsements of Jaffe and Messer; and that these defendants are not indebted to plaintiff in any sum.

On the trial in October, 1928, plaintiff, a resident of Dayton, Ohio, was a witness in his own behalf. After introducing the notes in evidence he testified in substance that he received them on the days of their dates from Chester H. Krone, treasurer of the corporation; that the signatures of the six defendants then appeared on the back as endorsers; that for each note he gave to the corporation a check for $2,500, which checks were subsequently cashed; that the corporation never paid him anything on the notes; but that after maturity he received $600 from three of the endorsers - $350 from Afremow, $150 from Chester H. Krone and $100 from Coffman. Each of the four defendants, who had been served with process, testified in support of their defenses. In rebuttal Nathan Haffenberg, one of plaintiff's attorneys, testified; plaintiff gave further testimony; portions of the depositions of Lawrence Rabinowitz and Sam Goldman were read to the jury; and certain writings were introduced. At the conclusion of all the evidence, and after the jury had been in-

that, as is all much made by some of the witnesses I am asked by it, said corporation was in receive [illegible], and plaintiff was without were to receive [illegible]; that plaintiff and defendants as aforesaid as been by the corporation of [illegible], with the further understanding that repayment of the sum should be made out of the first moneys received from sales of oil in Iaeh; that [illegible] stockholders of the corporation consisted of Tolbert, Wilson, Jones, the Kennedy, Murphy Tolle and Frank Bessey; that it was agreed with plaintiff that, if the corporation could [illegible] the notes, said stockholders would endorse the same, and then plaintiff was to secure the endorsement on the notes of all of said stockholders, including Tolle and Bessey, and that if the endorsements of all were not procured the notes should be cancelled; that plaintiff failed to secure the endorsements of Tolle and Bessey; and that these defendants are not indebted to plaintiff in any sum.

On the trial in [illegible], 1908, [illegible] a [illegible] system, only, was a [illegible] in [illegible] [illegible] the notes in evidence in [illegible] [illegible] on the day of their [illegible] [illegible] corporation; that the [illegible] of the [illegible] on the back as [illegible] [illegible] a check for [illegible] [illegible] corporation never paid [illegible] [illegible] [illegible] [illegible] [illegible] of the four [illegible] [illegible] [illegible] [illegible] in support of their defense. [illegible] [illegible] of plaintiff's testimony, [illegible] [illegible] portions of the depositions of [illegible] were read in the jury was [illegible] [illegible] the execution of [illegible] [illegible] [illegible] [illegible]

structed by the court, they returned a verdict finding the issues against the four defendants (plaintiffs in error) and assessing plaintiff's damages at $5324. The judgment in question followed.

We refrain from further outlining the evidence because we have reached the conclusion that the judgment must be reversed, and the cause remanded for another trial, on account of erroneous instructions given by the court on behalf of plaintiff. Among the given instructions are the following:

> 11. The Court instructs the jury that if you believe from the evidence that the notes were delivered to the plaintiff with the understanding that the plaintiff was to secure additional endorsers, then you are instructed to find the issues for the plaintiff.
>
> 12. The Court instructs the jury that if you find from the evidence that at the time the notes were delivered to the plaintiff in this case, that the same were complete and no further or additional signatures were to be obtained other than the endorsers, now on said note, then your finding should be for the plaintiff."

These instructions each directed a verdict for plaintiff and neither contained all of the facts and conditions which, under the issues made by the pleadings, would justify a verdict for him. In De Stefano v. Associated Trust Co., 318 Ill. 345, 348, it is said: "Where an instruction directs a verdict for either party, or amounts to such direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed. (Pardridge v. Butler, 168 Ill. 504)". And such erroneous instructions, directing a verdict, cannot be cured by other instructions. (Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 531.)

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

structed by the court, they [illegible] a verdict finding the issues against the [illegible] (liability or error) and [illegible] plaintiff's damages at [illegible]. The judgment in question follows.

It was the first number relating the [illegible] we have [illegible] the commission shall [illegible] and the other [illegible] instructions given by the court on behalf of plaintiff. [illegible] given instructions are [illegible]:

> 11. The court instructs the jury that if you believe from the evidence that [illegible] plaintiff [illegible] the [illegible] actual additional damages, then you are [illegible] the issues for the plaintiff.
>
> 14. The court instructs the jury that if you find from the evidence that [illegible] plaintiff [illegible] further or additional damages [illegible] than the [illegible] be for the plaintiff.

These instructions [illegible] and neither [illegible] all of the facts [illegible] the issues [illegible] the plaintiff. [illegible] In [illegible] v. [illegible] "there an instruction directed [illegible] to such direction in [illegible] necessarily [illegible] directed." [illegible] v. [illegible], [illegible] instructions, [illegible] (citing [illegible] v. [illegible], [illegible]).

The judgment is reversed [illegible].

[illegible]

Burnes, [illegible] and [illegible] concur.

33722

FRANK OTT,
Appellee,

v.

L. F. HAMMEL and
IDALINE R. HAMMEL,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in contract based upon a promissory note defendants, on May 17, 1929, moved to strike plaintiff's statement of claim from the files but the motion was denied. They elected to stand by their motion and refused to plead, and thereupon the court defaulted them for want of an affidavit of merits and entered judgment against them for the amount of plaintiff's claim, $838.20. The present appeal followed. Plaintiff has not filed a brief in this court.

The action was commenced on April 19, 1929. Plaintiff alleged in his statement of claim that his claim "is for the principal amount of $700, and interest thereon at 6% from December 18, 1925, upon a note executed by defendants and delivered to the Sheboygan Loan & Trust Company" (copy of note attached); that the note "was negotiated and assigned to him by the Sheboygan Loan & Trust Company for a valuable consideration on December 27, 1918; and that he is the actual, equitable and bona fide owner thereof."

The copy of the attached note purports to be one signed by both defendants, dated December 18, 1918, whereby for value received they promised to pay six years after date to the Sheboygan Loan & Trust Co., or order, $700 in gold coin, with 6% interest from date until paid, etc. The note does not bear any endorsement by the payee. Plaintiff's affidavit, accompanying his statement of claim,

UNITED

STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 1,

L. V. RAWLS and
THALIA P. RAWLS,
Appellants,

v.

FIRST NATIONAL BANK OF CHARLOTTE,
Appellee.

MR. JUSTICE SUTHERLAND DELIVERED THE OPINION OF THE COURT.

In an action in contract based upon a promissory note, defendants, on May 17, 1926, moved to dismiss plaintiff's complaint of claim from the files but the motion was denied. They elected to stand by their motion and refused to plead, and thereupon the court definitely ruled that for want of sufficiency of pleading the entered judgment against them for the amount of plaintiff's claim. Upon the proceeding appeal follows. Finding it not filed a brief in this court.

The action was commenced on April 1, 1926. Plaintiff alleged in his statement of claim that his claim "is for the principal amount of ..., and interest thereon at the rate ... 18, 1923, upon a note executed by defendants ... delivered to the plaintiff upon a Times ... note ... Times Company ... and that ... in the same ... The copy of the ... by both defendants ... contained ... date until paid, etc. The note ... paper. Plaintiff's attorney ...

is as follows:

"State of Wisconsin)
County of Sheboygan)
City of Sheboygan) ss. Frank Ott, being first duly sworn, on oath states that he is the plaintiff in the above entitled cause; that he has knowledge of the facts; that the said cause is a suit upon a contract for the payment of money; that the nature of plaintiff's demand is as stated; and that there is due to plaintiff from defendants, after allowing to defendants all their just credits, deductions and set offs, the sum of $838.20.
(signed) Frank Ott
Subscribed and sworn to before
me this 16th day of April A. D. 1929
(Signed) Henry A. Ditling
Notary Public. - Wis."

The notary's seal is affixed to the paper but he does not certify that he is authorized to administer oaths in Wisconsin by the laws of that State.

We are of the opinion that the court erred in not granting defendant's motion to strike plaintiff's statement of claim from the files and that the judgment appealed from cannot stand. As the note does not bear the endorsement of the payee it is evident that plaintiff seeks a recovery in his own name on the theory that he is the assignee and the equitable and bona fide owner of a chose in action. It is provided in part in section 18 of our Practice Act (Cahill's Stat. 1927, p. 1944) that "the assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; * * ." He does not so allege in his affidavit and, hence, his statement of claim and accompanying affidavit does not state a cause of action under the statute. (Madison & Kedzie State Bank v. Old Reliable Motor Truck Co., 236 Ill. App. 442, 444; Allis-Chalmers Mfg. Co. v. Chicago, 297 Ill. 444, 450; Gallagher v. Schmidt, 313 Ill. 40, 44.) Furthermore, plaintiff's statement of claim is not accompanied by any valid affidavit. The claimed affidavit

is as follows:

"State of Wisconsin }
County of Sheboygan }
City of Sheboygan } ss. Frank Ott, being first duly sworn, on path states that he is the plaintiff in the above entitled cause; that he has knowledge of the facts; that the said cause is a suit upon a contract for the payment of money; that the nature of plaintiff's demand is as stated; and that there is due to plaintiff from defendants, after allowing to defendants all their just credits, deductions and set offs, the sum of $232.20.
(signed) Frank Ott
Subscribed and sworn to before
me this 16th day of April A. D. 1929
(signed) Henry A. Nitting
Notary Public. - Sia."

The notary's seal is affixed to the paper but he does not certify that he is authorized to administer oaths in Wisconsin by the laws of that state.

We are of the opinion that the court erred in not granting defendant's motion to strike plaintiff's statement of claim from the files and that the judgment appealed from cannot stand. As the note does not bear the endorsement of the payee it is evident that plaintiff seeks a recovery in his own name on the theory that he is the assignee and the equitable and bona fide owner of a chose in action. It is provided in part in section 12 of our Practice act (Smith's Stat. 1927, p. 1064) that "the assignee can equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on such, or by his affidavit where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; * * *." He does not so allege in his affidavit and, hence, his statement of claim and accompanying affidavit does not state a cause of action under the statute. (Madison A. Jackie State Bank v. Ole Reliable Motor Truck Co., 206 Ill. App. 620, 624; Mills-Chalmers Mfg. Co. v. Chicago, 207 Ill. 464, 469; Dallmeyer v. Schmidt, 232 Ill. 40, 44.) Furthermore, plaintiff's statement of claim is not accompanied by any valid affidavit. The claimed affidavit

of Frank Ott (plaintiff) appears to have been sworn to before a notary public in the State of Wisconsin but that notary has not made any certificate of his authority to administer oaths under the laws of that State (Beanoyers Shoe Co. v. First National Bank, 188 Ill. 312, 318; Ferris v. Commercial National Bank, 158 id. 237, 241; Smith v. Lyons, 80 id. 600.)

The judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Scanlan, J., concur.

of Frank Ott (plaintiff) appears to have been sworn to before a notary public in the State of Wisconsin but that notary has not made any certificate of his authority to administer oaths under the laws of that State (Commercial Union Co. v. First National Bank, 188 Ill. 312, 318; Ferris v. Commercial National Bank, 152 Ia. 237, 241; Smith v. Lyons, 88 Ia. 606.)

The judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, J., and Conklin, J., concur.

48a

255 I.A. 618

33733

UNITED STATES WICKER FURNITURE CO., a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
LAKESIDE UPHOLSTERING CO., a corporation, Appellant.	

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit there was a finding and judgment, June 18, 1929, against defendant for $1,028.75, and this appeal followed.

In plaintiff's statement of claim, filed March 23, 1929, it is alleged that defendant is indebted to it in the sum of $1,028.75 for certain goods and merchandise (furniture) sold and delivered. There is attached an itemized statement of the furniture (showing the sale price of the several pieces) and the usual affidavit of plaintiff's claim.

On April 13, 1929, defendant filed its so-called "special" appearance, "for the sole and only purpose of moving to dismiss and abate the action." In its amended affidavit, in support of the motion made, it is stated in substance that plaintiff is a corporation of the State of New Jersey and there incorporated for the purpose of doing a general wholesale furniture business, with principal place of business at Hoboken, New Jersey; that it is not, and was not at the time of the commencement of the suit, either licensed to do business or incorporated in the State of Illinois; that it "is doing business within this State without a license;" that "all the transactions referred to in its statement of claim were transactions completed in Chicago, Illinois;" and that, therefore, it has no right to maintain

38733

UNITED STATES FIDELITY AND GUARANTY CO., a corporation,
appellee,

v.

LAKESIDE DRESSLER-KING CO., a corporation,
appellant.

ABSTRACT WORK CONTINUED.

CONTRACT ON INSURANCE.

IN. JUSTICE OTTO KERNER OF THE ILLINOIS SUPREME COURT.

In a first class action in assumpsit there was a finding and judgment, June 16, 1933, against defendant for $1,022.75, and this appeal followed.

In plaintiff's statement of claim, filed March 3, 1933, it is alleged that defendant is indebted to it in the sum of $1,022.75 for certain goods and merchandise (furniture) sold and delivered. There is attached to the statement a schedule (showing the sale price of the several pieces) and the total difference of plaintiff's claim.

On April 12, 1932, defendant filed its so-called "special appearance," "for the sole and only purpose of moving to dismiss, and abate the action." In its motion it alleges, in support of the motion here, it is stated in substance that plaintiff is a corporation of the State of New Jersey, not there incorporated "for the purpose of doing a general retail furniture business," with a [illegible] business at Chicago, New Jersey; that it is [illegible] time of the commencement of the suit, either its home [illegible] or incorporated in the State of Illinois; that it "is doing business within this state without a license;" that [illegible] referred to in the statement of claim were transactions completed in Chicago, Illinois; and that, therefore, it has no right to maintain

a suit in any court of record in Illinois. Subsequently defendant was given leave to file, and filed, certain interrogatories to be answered by plaintiff. The answers thereto were to the effect that at the time of commencement of the suit plaintiff was not incorporated in Illinois, and had no certificate of authority to do business in this State.

Subsequently on the issue raised by defendant's said motion, and affidavit in support thereof, there was a hearing before the court without a jury. This was had in accordance with Rule 12 of the Municipal Court, which is contained in the present transcript certified by the judge, as follows:

> "Rule 12. Where the defendant desires to set up matters in abatement or question the jurisdiction of the Court, he shall present the same by a written motion specifying the grounds thereof, and support the same by an affidavit except where the matters relied on to support the motion appear of record. If such motion raises an issue of fact dehors the record the Court shall hear evidence presented by the respective parties, provided, that if a jury be demanded the matters shall be set for immediate hearing."

On the hearing on the motion defendant introduced a certified copy of the certificate of incorporation of plaintiff in the State of New Jersey, and plaintiff's answers to said interrogatories. Jacob Zake, president of defendant, testified for it at considerable length and certain other writings were introduced. Thereupon plaintiff called said Zake as its witness under section 33 of the Municipal Court Act and he gave further testimony. Plaintiff also introduced certain letters, statements and other writings. At the conclusion of all the evidence the court denied defendant's motion to dismiss and abate the action.

Thereupon defendant moved (1) for leave to amend its special appearance so that the same stand as a general appearance, and (2) for leave to file its affidavit of merits to plaintiff's statement of claim and for a further trial. Both of these motions were overruled and thereupon the court without any further hearing

a suit in any court of record in Illinois. Subsequently defendant was given leave to file, and filed, certain interrogatories to be answered by plaintiff. The answers thereto were to the effect that at the time of commencement of the suit plaintiff was not incorporated in Illinois, and had no certificate of authority to do business in this state.

Subsequently on the issues raised by defendant's motion, and affidavit in support thereof, there was a hearing before the court without a jury. This was had in accordance with rule 12 of the Municipal Court, which is contained in the present transcript certified by the judge, as follows:

"Rule 12. Where the defendant desires to set up matters in abatement or question the jurisdiction of the court, he shall present the same by a written motion specifying the grounds thereof, and support the same by affidavit. Plaintiff may counter-file on the motion by affidavit. If such motion raises an issue of fact therein, the court shall hear evidence thereon by the respective parties, provided, that if a jury be demanded the matter shall be set for immediate trial."

On the hearing on the motion defendant introduced a certified copy of the certificate of incorporation of plaintiff in the state of New Jersey, and plaintiff's answers to said interrogatories. Jacob Lake, president of defendant, testified for it at considerable length and certain other witnesses were interrogated. Thereupon plaintiff called [illegible] as its witness in rebuttal one of the municipal Court [illegible] and he gave further testimony. Plaintiff also introduced certain letters, statements and other writings. At the conclusion of all the evidence the court [illegible] motion [illegible] and dismiss the action.

Thereupon defendant moved (1) for leave to amend its special appearance so that it may [illegible] and (2) for leave to file an affidavit of merits in [illegible] statement of claim and for a further trial. Both of these motions were overruled and thereupon the court [illegible] further hearing

entered the finding and judgment as first above mentioned.

Defendant's counsel first contend that the court erred in refusing defendant's motion to dismiss and abate the action. The argument is in substance that on the question whether plaintiff prior to the commencement of the suit had been doing business in Illinois without a license and in violation of the law of this State, the Court's action is manifestly against the weight of the evidence. We do not think there is any merit in the contention or argument. It appears from the evidence in substance that in September, 1928, one B. M. Young was in the wholesale furniture business in Chicago, with an office and show room in the American Furniture Mart building; that during that month he called upon Zake, president of defendant, represented himself to be a selling agent for plaintiff, and solicited the purchase by defendant of certain furniture, according to samples on display in said show room; that Zake went there and made selections of certain furniture at certain agreed prices, and directed that shipments be made by plaintiff from its place of business in Hoboken, New Jersey, to defendant's place of business in Chicago; that in accordance with these directions Young, on his own stationery, under date of September 18, 1928, sent an order to plaintiff at Hoboken, directing it to sell and ship by freight from Hoboken to defendant at Chicago certain furniture at certain enumerated prices, the samebeing in accordance with Zake's selections; and that thereafter all the furniture, as ordered and selected by Zake, was shipped by plaintiff from Hoboken to defendant at Chicago and was duly received by it. During the hearing defendant's attorney said: "We admit we received all the goods." No contention was made that any of the prices charged for the furniture was incorrect. Zake, however, gave testimony to the effect that his arrangement with Young was that the furniture was to be shipped on consignment as distinguished from an absolute

entered the finding and judgment as first above mentioned.

Defendant's counsel first contend that the court erred in refusing defendant's motion to dismiss and quash the action. The argument is in substance that on the question whether plaintiff prior to the commencement of the suit had been doing business in Illinois without a license and in violation of the law of this state, the Court's action is manifestly against the weight of the evidence. We do not think there is any merit in the contention on the ground. It appears from the evidence in substance that in September, 1928, one B. M. Young was in the wholesale furniture business in Chicago, with an office and show room in the American Furniture Mart building; that during that month he called upon Sabo, president of defendant, represented himself to be a selling agent for plaintiff, and solicited the purchase by defendant of certain furniture, according to samples on display in said show room; that Sabo and Young made selections of certain furniture at certain agreed prices, and directed that shipment be made by plaintiff from its place of business in Kansas, New Jersey, to defendant's place of business in Chicago; that in conference with these directions Young, on his own responsibility, under date of September 18, 1928, sent an order to plaintiff at Lebanon, directing it to sell and ship to Freight Line Cooperage in defendant at Chicago certain furniture at certain enumerated prices, all according in accordance with Sabo's selections; and that defendant, on the furniture, as ordered and selected by Sabo, was shipped by plaintiff from Lebanon to defendant at Chicago and was duly received by the defendant the Morning defendant's attorney said: " Sabo, we received all the goods." No contention was made that any of the prices for the furniture was incorrect. Sabo, however, gave testimony to the effect that his arrangement with Young was that the furniture was to be shipped on consignment as distinguished from an absolute

sale. There was other evidence tending to show that there had been an absolute sale by plaintiff to defendant of all the furniture so shipped and received. No further evidence than the above was offered by defendant in support of its said contention that plaintiff had been doing business in Illinois in violation of the statute of this State. We think it clear that the above enumerated transactions between plaintiff and defendant were interstate commerce transactions, and that because of them plaintiff cannot be considered as having done business in Illinois in violation of said statute. In McKenna Steel Working Co. v. Harris Brothers Co., 228 Ill. App. 363, 368, it is said: "It has been repeatedly held in this State that where a foreign corporation has no established place of business of any kind in the State, and carries on no local business but merely sells its merchandise, through the instrumentality of soliciting agents or drummers, and delivers the same through common carriers in the ordinary course of business, such corporations are not transacting business in this State within the meaning of the statute." (citing Lehigh Portland Cement Co. v. McLean, 245 Ill. 326, and other cases.)

Equally without merit, in our opinion, are counsels' further contentions that the court erred (1) in overruling defendant's motion for leave to file a general appearance, and (2) in overruling its motion for leave to file an affidavit of merits to plaintiff's statement of claim and for a further trial. Defendant's appearance, though denominated "special," was a general appearance, and, hence it cannot be considered error for the court to have refused to allow defendant to do something which it had already done. Defendant did not question the jurisdiction of the court to hear the cause. In Kunde v. Prentice, 329 Ill. 82, 86, it is said: "A special appearance must be for the purpose of urging jurisdictional objections, only, and it must be confined to a denial of jurisdiction. (Nicholes v. People, 165 Ill. 502.) An appearance for any other purpose than to question

rule. There was other evidence tending to show that there had been an absolute sale by plaintiff to defendant of all the furniture so shipped and received. No further evidence than the above was offered by defendant in support of its said contention that plaintiff had been doing business in Illinois in violation of the statutes of this State. We think it clear that the above uncontroverted transactions between plaintiff and defendant were interstate commerce transactions, and that because of them plaintiff cannot be considered as having done business in Illinois in violation of said statute. In Robinson Local Company Co. v. Purple Brothers Co., 328 Ill. App. 588, 588, it is said: "It has been repeatedly held in this State that where a foreign corporation has no established place of business or any agent in the State, and carries on no local business but merely sells its merchandise, through the instrumentality of soliciting agents or drummers, and delivers the same to such customers outside in the ordinary course of business, such corporations are not transacting business in this State within the meaning of the statutes." (citing Illinois Furniture Company Co. v. Lockman, 0 Ill. App. 0, and other cases.)

Equally without merit, in our opinion, are appellee's further contentions that the court erred (1) in overruling defendant's motion for leave to file a general demurrer, and (2) in overruling the motion for leave to file an affidavit of merits or plaintiff's statement of claim and for a further trial. [illegible] Illinois's dominant "special" [illegible] it cannot be considered error [illegible] to overrule defendant's motion [illegible] defendant to do something which it [illegible] did not question the jurisdiction of the [illegible] Kunde v. Kunkle, 324 Ill. 32, 3-, it is said: "special appearance must be for the purpose of raising jurisdictional objections only, and it must be confined to a denial of jurisdiction." Hilliard v. Kegle, 168 Ill. 302.) An appearance for any other purpose than [illegible]

the jurisdiction of the court is general." And, by the common law rule followed in numerous decisions in this State, where an issue of fact is made upon a plea in abatement and the issue is found against the defendant, the judgment is quod recuperet for plaintiff, and not one of respondeat ouster. (Brown v. Illinois Central Ins. Co., 42 Ill. 366, 369; Greer v. Young, 120 id. 184, 191.) In the Greer case it is said: "If the plaintiff is successful upon such issue, the judgment is quod recuperet. It is therefore to him a valuable right to have the issue thus made up and tried. To permit the defendant to try an issue of this kind on affidavit, as was done, gives him a decided advantage, for if he fails, his motion would be simply overruled, and he would still have a right to a trial on the merits. To permit a party to thus speculate on the chance of succeeding on a purely technical ground, without incurring any risk, and without any compensation to the plaintiff in case of failure, is contrary to the spirit of the common law, and is in direct conflict with the decisions of this court." (citing cases) And we do not think that section 45 of the Present Practice Act has changed the common law rule, as here applicable. It is therein provided that "if the issue on any plea in abatement is the truth of a statement in the return on the summons, or that the defendant is sued out of his proper county, or is not subject to suit in the county in which the suit is brought, or that the court has no jurisdiction over the person of the defendant, and such issue is found against the defendant, the judgment shall be respondeat ouster." The issue tendered by defendant's motion and affidavit in the present case is not included in the conditions mentioned in said section 45. (See Pollock v. Kinman, 176 Ill. App. 361, 364.) And, under the provisions of Rule 12 of the Municipal Court, above set out, we think that defendant's motion in the present suit to "dismiss and abate the action,"

the jurisdiction of the court is general." [illegible], by the common law rule followed in numerous decisions in this state, where an issue of fact is made upon a plea in abatement and the issue is found against the defendant, the judgment is "not respondent 'or plaintiff', but not one of respondent ouster. (Brown v. Illinois Central Ins. Co., 4 Ill. App. 365, 369; Dreer v. Young, 107 Ill. App. 101.) In the Brown case it is said: "If the jurisdiction [illegible] upon such issue, the judgment is not respondent. It is therefore to him a valuable right to have the issue made by one trial. To permit the defendant to try an issue of this kind as effectively as was done, gives him a decided advantage, for if he fails, his motion could be simply overruled, and he would still have a right to a trial on the merits. To permit a part to thus speculate on the chance of success, by a purely technical [illegible] may risk, and without any [illegible] failure, is contrary to the spirit of the [illegible] conflict with the decisions of this court." [illegible] do not [illegible] the decision of the [illegible] the common [illegible], we hold applicable. It is therefore evident that "if the issue on any plea in abatement in the trial of a defendant in the return on the summons, or [illegible] is made on a [illegible] his proper country, or is not subject [illegible] the suit is brought, or [illegible] the jurisdiction over the person of the defendant, [illegible] the judgment shall be respondent ouster." The same [illegible] by defendant's motion and [illegible] in the [illegible] in the consolidated [illegible] Kimmen, 17 Ill. App. 441, 444. [illegible] Rule 12 of the municipal court, [illegible] defendant's motion in the [illegible] to [illegible] and [illegible]."

supported by an affidavit, was the equivalent of a sworn plea in abatement filed in a circuit court, and that the sanctioned rule above mentioned should here be applied. (Friend & Co. v. Goldsmith & Seidel Co., 307 Ill. 45, 48.)

Our conclusion is that the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Scanlan, J., concur.

supported by an affidavit, was the equivalent of a sworn plea in abatement filed in a circuit court, and that the mandatory rule above mentioned should here be applied. (Mutual L. Ins. v. Goldsmith & Bodell Co., 307 Ill. 48, 52.)

Our conclusion is that the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Barron, P. J., and Gossett, J., concur.

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255 I.A. 618

JOHN GRIFFITHS & SON CO.,
a Corporation,
Appellee,

vs.

FRED MANN and GUSTAV MANN,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $8,000 entered in the Circuit Court of Cook County, in favor of John Griffiths & Son Company, a corporation, plaintiff, and against Fred Mann and Gustav Mann, defendants. The case was tried before the court, with a jury.

The declaration consisted of the common counts. The affidavit states that there was due the plaintiff from the defendants, after allowing the latter all their just credits, deductions and set-offs, the sum of $10,607.36. The claim was for work and labor done, materials furnished, etc., in the making of certain alterations and additions to premises leased by the two defendants from the Moir Hotel Company for the purpose of conducting a restaurant therein. The defendants filed a plea of the general issue and also a verified plea denying joint liability. The defendant Gustav Mann later filed an additional plea averring that on May 27, 1926, he was one of the organizers of a corporation then in process of being organized, etc., by the name of Mann's Catering Company; that the purpose of the corporation was to conduct a restaurant business under the name of the Rainbo Boston Oyster House, "in certain premises in a building called Morrison Hotel;" that plaintiff was then advised of the aforesaid facts and then and there entered into an agreement in writing with the defendant Gustav Mann for the furnishing by plaintiff of certain labor and material

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JOHN GRIFFITHS & SON CO.,
a Corporation,
Appellee,

vs.

FRED KAHN and GUSTAV KAHN,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $6,000 entered in the Circuit Court of Cook County, in favor of John Griffiths & Son Company, a corporation, plaintiff, and against Fred Kahn and Gustav Kahn, defendants. The case was tried before the court, with a jury.

The declaration consisted of the common counts. The affidavit states that there was due the plaintiff from the defendants, after allowing the latter all their just credits, deductions and set-offs, the sum of $10,807.32. The claim was for work and labor done, materials furnished, etc., in the making of certain alterations and additions to premises leased by the two defendants from the Moir Hotel Company for the purpose of conducting a restaurant therein. The defendants filed a plea of the general issue and also a verified plea denying joint liability. The defendant Gustav Kahn later filed an additional plea averring that on May 27, 1926, he was one of the organizers of a corporation then in process of being organized, etc., by the name of Kahn's Catering Company; that the purpose of the corporation was to conduct a restaurant business under the name of the Marine Dining Room, "in certain premises in a building called Morrison Hotel;" that plaintiff was then advised of the aforesaid fact and then and there entered into an agreement in writing with the defendant Gustav Kahn for the furnishing by plaintiff of certain labor and material

and the making of certain alterations and additions to said premises; that the plaintiff was to furnish all the labor and material required to complete the entrance to said Oyster House in said hotel, for which said defendant agreed to pay the actual cost plus ten per cent profit, and to make payments from time to time as the work progressed and to make final payment upon the completion of the work; that on May 27, 1926, said corporation was duly organized, etc., to conduct said restaurant, and thereupon entered into possession of said premises; that said defendant was a stockholder, director and officer in said corporation, all of which was then and there known to plaintiff; that on or about June 1, 1926, it was agreed between the plaintiff and said defendant and said Catering Company that in consideration of the promise and agreement of said Catering Company then and there made by it to the plaintiff that the Catering Company assumed and agreed to perform the obligations of said agreement which were to have been performed by said defendant, and the plaintiff agreed to release said defendant from the obligations of said contract, and agreed with said Catering Company to perform said work and deliver said materials to said Catering Company; that the plaintiff thereafter received and accepted various payments from said Catering Company on account of the contract price of work done and materials delivered and that thereby said defendant was released from the obligations of the said contract. An affidavit of merits verifying said plea was also filed.

The defendants contend that "there is no evidence in the record showing the joint liability of the defendants," and that therefore "the Court erred in denying defendants' motion for a directed verdict." We find no merit in this contention. It is based largely upon the assumption that the letter of the plaintiff, dated May 27, 1926, and addressed to the defendant Gus Mann, "constituted a valid and binding agreement between the plaintiff

and the making of certain alterations, and additions to said struc-
ture; that the plaintiff was to furnish all the labor and material
required to complete the building in said Oster Cove in said
hotel, for which said defendant agreed to pay the sum of six plus
ten per cent profit, and that the plaintiff took the lease in the
work progressed and [illegible] payments were made [illegible]
the work; that on May 27, 1924, said corporation was duly organized,
etc., to conduct said business, [illegible] corporation acquired into
possession of said property; that said defendant was a stockholder,
director and officer in said corporation, and at all times was been and
there known to plaintiff; that [illegible] of stock were [illegible], it was
agreed between the [illegible] and defendant [illegible] said Oster Cove
Company that in consideration [illegible] said
Oster Cove Company [illegible] the
Oster Cove Company [illegible] the
said agreement said [illegible] were to have been performed by said defendant,
and the plaintiff agreed to [illegible] from the obliga-
tions of said contract, and [illegible] said defendant [illegible]
perform said work and deliver said [illegible] to [illegible]
pany; that the plaintiff [illegible] and [illegible]
payments from said [illegible] account [illegible]
of work done and furnished [illegible] which [illegible]
was refused from the [illegible] of said [illegible]. [illegible]
of merits verifying said [illegible].

[illegible]

the record showing the [illegible] "[illegible]" and
therefore "the [illegible] in denying defendant's motion for a
directed verdict." [illegible] in [illegible]. It is
based largely upon the assumption that [illegible] plaintiff,
dated May 27, 1924, and [illegible] the [illegible]
"constituted a valid and binding [illegible] between the plaintiff

and Gus Mann only," and that "this was the contract under which plaintiff proceeded to perform services and furnish materials," and that it is evident from this contract "that the plaintiff did not look to Fred Mann for payment, nor did Fred Mann, either expressly or impliedly, by that agreement agree to pay for any work or materials." After a careful consideration of all the facts and circumstances in this case we have reached the conclusion that the letter in question is not the only evidence that must be considered in determining whether Fred Mann was a party to the contract in question. Plaintiff's manager, Reuttinger, testified that this letter was not intended to constitute the agreement with regard to the work done and that he wrote it solely because Gustav Mann asked him to write the letter in order that he, Gustav, might have something to show his brother Fred as to the agreement. Moir Hotel (Morrison Hotel) leased the premises in question to Fred Mann and Gustav Mann. By the terms of the lease they were authorized to make alterations in the premises. A written agreement, supplemental to this lease, dated May 12, 1926, authorized them to enter a portion of the premises on May 25, 1926, for the purpose of commencing alterations, etc. At the time the defendants executed this supplemental agreement they discussed with Mr. Campbell, the vice president of the Moir Hotel Company, the alterations to be made, and they asked him who was the "right party" for them to hire to do the work, and he stated that the plaintiff had built the Morrison hotel and was the "one concern in town that has facilities to go ahead with the work and do it quick," and at the suggestion of Gustav Mann, Mr. Campbell, in the hearing of both defendants, telephoned the plaintiff in reference to the work. The defendants were anxious that the work should be completed at the earliest possible moment in order that the restaurant might be open for the Eucharistic Congress that was to convene in Chicago on June 15.

and Gun Loan Co[illegible]," and that "this was the contract which [illegible] plaintiff proceeded to perform services and furnish materials," and that it is evident from this [illegible] that it was or intended not just to [illegible] the property, nor the [illegible], either personally or individually, by that agreement [illegible] any other or materials." After a [illegible] discussion of the [illegible] circumstances in this case [illegible] letter in question is not [illegible] that it be considered in determining whether [illegible] in question. Plaintiff's counsel, however, insists that this letter was not intended to constitute the agreement with respect to the work done and that he wrote it [illegible] Gustave Wurm asked him to write the letter [illegible] Wurm, [illegible] testifying to [illegible] (Warrison Hotel) [illegible] Gustave Wurm. [illegible] make alterations in the [illegible] to this issue, [illegible] position of the [illegible] alterations, [illegible] elemental accounts [illegible] president of the [illegible] and they [illegible] to the work, [illegible] son hotel and was [illegible] to dread with the work [illegible] Gustave Wurm, Jr. [illegible] telephoned the plaintiff in [illegible] were anxious that the [illegible] possible amount in order [illegible] Bucharlatic Company that [illegible]

Fred Mann admitted that at this meeting the matter of the alterations and changes that were to be made was discussed for over an hour and that he took part in the discussion and approved of the plans as suggested by his brother Gustav. Fred Mann further admitted that at this meeting Mr. Campbell "assured us that Mr. Griffiths would do it." It will be noted that the two defendants were then in possession of the premises upon which the work was to be done by authority of the supplemental agreement signed that day, May 12. The plaintiff commenced work on the premises May 25, 1926, two days before the letter upon which the defendants rely was written. Reuttinger testified that he had met the defendant Fred Mann at a number of places prior to May 25, 1926; that he had been in the same parties with him at ball games and other occasions; that he knew his voice; that about the middle of May, 1926, in a telephone conversation, Fred Mann stated to him that he (Fred Mann) and his brother Gustav were then in their attorney's office closing up a lease for the Boston Oyster House at the Morrison hotel and "that our (plaintiff's) name was suggested to him as being able to make alterations that were necessary to put the job in the kind of shape that he wanted it in. In other words, he was going to make it a different kind of place and he wanted to know how he could do it. I told him that it was a job that was very complicated and after the plans were ready we would be out in his place within ten days. He said: 'This sounds all right, it is satisfactory to me but I will send my brother Gus over to see you and you and he can go completely over the details;'" that two or three days afterwards the defendant Gustav Mann came to the plaintiff's office and stated to him that he was there at the request of his brother Fred; that at this meeting the matter of the alterations was discussed; that Gustav said that the plaintiff was to send its bills to the architects for approval, and that whatever amount they approved "he and his brother Fred would pay." The defendant Fred Mann had been a

Fred Kuan admitted that at this meeting the matter of the alterations and changes that were to be made was discussed for over an hour and that he took part in the discussion and approved of the plans as suggested by his brother Sawyer. Fred Kuan further admitted that at this meeting Mr. Campbell "ordered me that Mr. Griffiths would do it." It will be noted that the defendants were then in possession of the premises on which the work was to be done by authority of the supplementary agreement signed that day, May 10. The plaintiff commenced work on the premises May 12, 1928, two days before the letter upon which the defendants rely was written. Sawyer testified that he had met the defendant Fred Kuan at a number of places prior to May 12, 1928; that he had been in the same partie club as Hall, Moore and other occasions; that he knew his voice; that about the middle of May, 1928, in a telephone conversation, Fred Kuan stated to him that he (Fred Kuan) and his brother Sawyer were then in Sawyer's office preparing up a lease for the Hotel Lincoln. Sawyer testified that Fred said "that our (plaintiff's) name was mentioned in connection with the make alterations that were necessary; that I left it the kind of shape that he wanted it in. He said, in other words, he was going to make it a different kind of place and that he would not do anything to it. I told him that it was a job that was very complicated and after the plans were ready we could go in and make the alterations in two days. He said: 'This sounds all right, I will contract for it but I will send my brother Sawyer over to see you and you can talk it over to satisfy over the details.' Then [illegible] Sawyer and the defendant Sawyer came [illegible] to him that he was then at the [illegible] of his [illegible] that at this meeting the matter of the alterations was discussed; that Sawyer said that the plaintiff was to send in his bill [illegible] estimates for approval, and [illegible] he and his brother Fred would pay." The plaintiff testified that on a

resident of Chicago for many years and was apparently a substantial business man. The defendant Gustav Mann had but recently come to Chicago, and there is much force in the argument of the plaintiff that it is unreasonable to assume, under all the circumstances in this case, that it would make its contract with Gustav Mann alone. We are satisfied that there is ample evidence to support the finding of joint liability. The defendants contend that the testimony of Reuttinger as to his acquaintance with Fred Mann and his ability to know his voice over the telephone was impeached by statements of the witness made at a former trial of the case. Assuming, for the purposes of the argument, that this last contention of the defendants is justified by the record, such impeachment would merely go to the credibility of the witness and the weight that should be attached to his evidence.

The defendants next contend that "the Court erred in not granting defendants' motion to strike all testimony of conversations and negotiations prior to the written contract." This contention is based upon the assumption that the letter of May 27, 1926, constituted the contract under which the plaintiff performed services and furnished materials, etc. We have heretofore disposed of this assumption of the defendants, and adversely to them.

The defendants next contend that "the verdict of the jury is against the overwhelming weight of the evidence and should have been vacated." There is no merit in this contention.

The defendants next contend that "it was error for the Court to admit in evidence the lease between the defendants and the Meir Hotel Company." We cannot agree with the defendants that this lease must be regarded as a transaction wholly unrelated to the subject matter of this suit. In our judgment the lease, together with the written agreement, supplemental to it, dated May 12, 1926, was a circumstance directly bearing on the important question as to the

resident of Chicago for many years and was apparently a substantial business man. The defendant Dexter Mann had but recently come to Chicago, and there is much force in the argument of the plaintiff that it is unreasonable to assume, under all the circumstances in this case, that it would make its contract with Dexter Mann alone. We are satisfied that there is ample evidence to support the finding of joint liability. The defendant contend that the testimony of Kettlinger as to his acquaintance with Fred Mann and his ability to know his value over the telephone was impeached by statements of the witness made at a former trial of the case. Assuming, for the purposes of the argument, that this last contention of the defendants is justified by the record, such impeachment would merely go to the credibility of the witness and its weight, that should be attached to his evidence.

The defendants next contend that "the court erred in not granting defendants' motion to strike affidavit of counsel-sections and depositions prior to the written contract." This contention is based upon the assumption that the letter of July 2, 1928, constituted the contract under which the plaintiff performed services and furnished materials, etc. We have previously disposed of this assumption of the defendants, and adverse to them.

The defendants next contend that "the trial of the jury is against the overwhelming weight of the evidence and should have been vacated." There is no merit in this contention.

The defendants next contend that "it was error on the court to admit in evidence the letter between the defendants and the Kelly Metal Company. The letter speaks [illegible] that this letter must be regarded as a true statement [illegible] the subject matter of this suit. In our judgment [illegible], considering the the written agreement, considered in it, [illegible] was a circumstance directly bearing on the [illegible] relation as to the

liability of Fred Mann. Moreover, the defendants offered the lease in evidence and they cannot now be heard to complain of its admission when offered by the plaintiff. (See Bogart v. Brazee, 331 Ill. 160, 181.) The defendants admit that they offered the lease in evidence, but they state that at the time they made the offer they informed the court that they introduced the lease for the purpose of showing "the assignment to the Mann Catering Company," and they apparently argue that this saves them from the effect of the rule stated in Bogart v. Brazee. We find no merit in this position. The lease was referred to by the parties in their talks about the proposed work and alterations, and it gave possession of the premises in question to two persons, Fred and Gus Mann, and, further, the written agreement of May 12, supplementary to the lease, showed plainly for whose benefit the proposed alterations were to be made.

The defendants next contend that the court erred "in admitting in evidence statements of account not shown by the evidence to have been received by defendants." It is admitted that the statements in question were received by the architects in charge of the alterations, and Reuttinger testified that Gus Mann told him that if the plaintiff did the work it was to take instructions from the architects and to send the bills to the architects for approval, and that he and his brother Fred would pay the bills that were so approved. We find no merit in the present contention.

The defendant next contends that "the verdict of the jury is inconsistent and illogical and was arrived at by compromise." In support of this contention the defendants state that it was stipulated between counsel for both parties that the balance due plaintiff was $10,607.36, and that the verdict of the jury should have been either that the defendants were not liable, or, if liable, that plaintiff's damages were $10,607.38. In Jones v. Bates, 179 Ill. App. 578, 584, the court states:

liability of Fred Mann. Moreover, the defendants offered the lease in evidence and they cannot now be heard to complain of its admission when offered by the plaintiff. (See Bennett v. Kreger, 221 Ill. 160, 163.) The defendants admit that they offered the lease in evidence, but they state that at the time they made the offer they informed the court that they introduced the lease for the purpose of showing "the assignment to the Mann Dairying Company," and they apparently argue that this saves them from the effect of the rule stated in Bennett v. Kreger. We find no merit in this position. The lease was referred to by the parties in their talks about the proposed work and alterations, and it gave possession of the premises in question to two persons, Fred and Gus Mann, and, further, the written agreement of May 12, supplementary to the lease, showed plainly for whose benefit the proposed alterations were to be made.

The defendants next contend that the court erred "in admitting in evidence statements of account not shown by the evidence to have been received by defendants." It is admitted that the statements in question were received by the architects in charge of the alterations, and Hamlinger testified that Gus Mann told him that if the plaintiff did the work it was to take instructions from the architects and to send the bills to the architects for approval, and that he and his brother Fred would pay the bills that were so approved. We find no merit in the present contention.

The defendant next contends that "the verdict of the jury is inconsistent and illogical and has arrived at by compromise." In support of this contention the defendants state that it was stipulated between counsel for both parties that the balance due plaintiff was $10,607.32, and that the verdict of the jury should have been either that the defendants were not liable, or, if liable, that plaintiff's damages were $10,607.32. In Jones v. Jones, 179 Ill. App. 578, 584, the court stated:

"This contention cannot prevail under the well established rule of law that the defendant cannot be heard to object because the amount allowed plaintiff was less than the evidence showed was due him. The plaintiff alone in such case is entitled to complain of the smallness of the verdict. Heyman v. Heyman, 210 Ill. 524; Reid v. Houston, 20 Ill. App. 48; Starks v. Schlensky, 128 Ill. App. 1."

The defendants contend that the court erred in giving several instructions to the jury at the instance of the plaintiff. We have carefully examined said instructions and we find no merit in the instant contention.

The defendants contend that the court erred in refusing to give the following instruction offered by the defendants:

"The Court instructs the jury that if you believe from the evidence that the defendant, Gustav Mann, entered into a contract with the plaintiff, John Griffiths & Son Co., for work and labor to be performed and materials to be furnished by the plaintiff, and that thereafter the Mann's Catering Co., a corporation, with the knowledge and assent of the said defendant, Gustav Mann, assumed and agreed to perform the obligations of said agreement which were to be performed by the said Gustav Mann, and that the said Mann's Catering Co. further agreed to pay for said work, labor and materials in accordance with the said agreement, and if you further believe from the evidence that the plaintiff, either expressly or impliedly, released and discharged the said Gustav Mann from the obligations of said agreement to be performed by the said Gustav Mann, and accepted the Mann's Catering Co. in the place and stead of the said Gustav Mann, and that thereafter the plaintiff did perform said work for and deliver said materials to the said Mann's Catering Co., and that plaintiff hereafter received and accepted various payments on account of the contract on the same from the said Mann's Catering Co., then you are instructed as a matter to law to find the issues for the defendants."

The defendants argue that this instruction is based upon the theory "that the contract was between Gustav Mann and plaintiff and that there was thereafter a novation agreement whereby Gustav Mann was released and that thereafter plaintiff performed the work for the corporation and accepted payments from the corporation on account thereof," and that it was highly essential to the defendants that this instruction should have been given. The instruction is subject to a number of just criticisms. We find no evidence in the record to warrant a theory of fact that the plaintiff "released and discharged" Gustav Mann (or Fred Mann) from the obligations of the

> "This contention cannot prevail under the well established rule of law that the defendant cannot be heard to object because the amount allowed plaintiff was less than the evidence showed was due him. The plaintiff alone in such case is entitled to complain of the smallness of the verdict. Hyman v. Jackson, 210 Ill. 324; Reid v. Boucher, 20 Ill. App. 49; Kaufman v. Schlosser, 128 Ill. App. 1."

The defendants contend that the court erred in giving several instructions to the jury at the instance of the plaintiff. We have carefully examined said instructions and we find no merit in the instant contention.

The defendants contend that the court erred in refusing to give the following instruction offered by the defendants:

> "The Court instructs the jury that if you believe from the evidence that the defendant, Gustav Kann, entered into a contract with the plaintiff, John Griffiths & Son Co., for work and labor to be performed and materials to be furnished by the plaintiff, and that thereafter the Kann's Catering Co., a corporation, with the knowledge and assent of the said defendant, Gustav Kann, assumed and agreed to perform the obligations of said agreement which were to be performed by the said Kann's Catering Co., and that the said Kann's Catering Co. further agreed to pay for said work, labor and materials in accordance with the said agreement, and if you further believe from the evidence that the plaintiff, either expressly or impliedly, released and discharged the said Gustav Kann from the obligations of said agreement to be performed by the said Gustav Kann, and accepted the Kann's Catering Co. in the place and stead of the said Gustav Kann, and that thereafter the plaintiff did perform said work for and deliver said materials to the said Kann's Catering Co., and that plaintiff thereafter received and accepted various payments on account of the contract on the same from the said Kann's Catering Co., then you are instructed as a matter of law to find the issues for the defendants."

The defendants argue that this instruction is based upon the theory "that the contract was between Gustav Kann and plaintiff and that there was thereafter a novation agreement whereby Kann was released and that thereafter plaintiff performed the work for the corporation and accepted payments from the corporation on account thereof," and that it was highly essential to the defendants that this instruction should have been given. The instruction is subject to a number of just criticisms. We find no evidence in the record to warrant a theory of fact that the plaintiff "released and discharged" Gustav Kann (or Fred Kann) from the obligations of the

agreement. Moreover, the jury were not given, in the instant instruction or any other instruction, a definition or explanation of the term "released and discharged." It is a sufficient answer to the defendants' contention that the instruction was based upon the theory that there was a novation of the original contract, to say that nowhere in this or any other instruction were the jury informed as to what would constitute a novation. The plaintiff contends that it entered into a contract with Gustav Mann and Fred Mann. The defendants contend that the plaintiff entered into a contract with Gustav Mann, alone. The instruction is not drawn upon the theory that the defendant Gustav Mann, alone, entered into a contract with the plaintiff, etc., and it ignores entirely the alleged responsibility of the defendant Fred Mann. If the jury should find from the evidence that he was a party to the contract, the instruction would only tend to mislead them. In our judgment, the instruction was very apt to confuse and mislead a jury of laymen.

The defendants contend that the court erred in refusing to give an instruction offered by them to the effect "that the plaintiff, in order to recover, must prove by a preponderance of the evidence that both Fred Mann and Gustav Mann ordered the work." It is is quite plain that under the facts and circumstances of this case the court was justified in refusing to give this instruction.

We are satisfied, from a careful examination of the entire record, that the work and labor done, materials furnished, etc., by the plaintiff under the contract, were for the benefit of both defendants. The defense in the case was of a shifty, evasive and technical character.

The judgment of the Circuit Court of Cook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

agreement. Moreover, the jury were not given, in the instant instruction or any other instruction, a definition or explanation of the term "released and discharged." It is a sufficient answer to the defendants' contention that the instruction was based upon the theory that there was a novation of the original contract, is say that nowhere in this or any other instruction were the jury informed as to what would constitute a novation. The plaintiff contends that it entered into a contract with Gustav Kann and Fred Kann. The defendants contend that the plaintiff entered into a contract with Gustav Kann, alone. The instruction in not drawn upon the theory that the defendant Gustav Kann, alone, entered into a contract with the plaintiff, etc., and it ignores entirely the alleged responsibility of the defendant Fred Kann. If the jury should find from the evidence that he was a party to the contract, the instruction would only tend to mislead them. In our judgment, the instruction was very apt to confuse and mislead a jury of laymen.

The defendants contend that the court erred in refusing to give an instruction offered by them to the effect "that the plaintiff, in order to recover, must prove by a preponderance of the evidence that both Fred Kann and Gustav Kann ordered the work." It is quite plain that under the facts and circumstances of this case the court was justified in refusing to give this instruction.

We are satisfied, from a careful examination of the entire record, that the work and labor done, materials furnished, etc., by the plaintiff under the contract, were for the benefit of both defendants. The defense in the case was of a shifty, evasive and technical character.

The judgment of the Circuit Court of Cass County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33410

CHARLES A. DAWELL,
Appellant,

v.

UNION TRUST COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles A. Dawell, brought an action in trespass on the case against Union Trust Company, a corporation, defendant, to recover damages for alleged negligence of defendant in failing to perform its duties as trustee and in negligently authenticating certain bonds of the Chicago Fuel Company, Inc., which were secured by a trust deed that conveyed certain lands, coal leases and coal contracts to defendant as trustee. The original declaration consisted of one count. Later, plaintiff filed two additional counts, designated as "First Additional Count" and "Second Additional Count." Defendant filed general and special demurrers to the declaration and each of the counts, and the trial court sustained the same to the declaration and each count thereof, and plaintiff electing to stand by the declaration, judgment for costs was entered against him. He has appealed.

The declaration is very lengthy, the first additional count taking up 111 pages of the abstract. The first count charged that Chicago Fuel Company, Inc., an Illinois corporation, executed a certain mortgage or deed of trust that conveyed to defendant, as trustee, real and personal property, rights, con-

[illegible]

CHARLES A. [illegible],
Appellant,

v.

UNION TRUST COMPANY,
a corporation,
Appellee.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles A. [illegible], brought an action in trespass on the case against Union Trust Company, a corporation, defendant, to recover damages for alleged negligence of defendant in failing to perform its duties as trustee and in negligently misrepresentations certain bonds or securities that [illegible], which were secured by a first [illegible] mortgage [illegible] coal lessee and coal contracts to defendant as trustee. The original declaration consisted of one count. [illegible] plaintiff filed two additional counts, designated as "first additional count" and "second additional count," [illegible] and specific damages to the destruction and loss of the bonds, and the trial court [illegible] in the declaration [illegible] each count [illegible], and plaintiff [illegible] to abide by the decision, judgment for costs was [illegible] in favor of the defendant. [illegible] has appealed.

The declaration is [illegible], the first additional count taking up 111 pages of the record. The first count charges that Union Trust Company, [illegible] trustee [illegible] executed a certain mortgage on [illegible] to defendant, as trustee, [illegible] [illegible]

tracts, privileges, franchises and other things of value, as security for its bonds to be issued under said mortgage, and that it delivered said instrument to defendant and the latter accepted it in writing "and the undertakings, conveyances, covenants and obligations thereby became established in the defendant as grantee and Trustee for and on behalf of all the persons who should then or thereafter purchase any of the bonds" of the said Fuel Company, issued under and in compliance with the terms of said mortgage, which required that said bonds, before they became valid, should be authenticated and certified by defendant; that defendant entered into and upon its duties as such trustee and thereafter issued and delivered to purchasers the permanent bonds of said Fuel Company issued under said mortgage deed; "that thereby and by means of said instrument and its acceptance by the defendant and by necessary inplication" defendant held out to purchasers of bonds issued by it under said mortgage that said Fuel Company had obtained a substantial amount of property of the kind and amount therein described, and of sufficient value to be reasonable security for each and all of the said bonds, and that defendant by necessary implication indicated to the said purchasers that said Fuel Company had exercised reasonable care and diligence to obtain such security, and that it had exercised the same degree of care in obtaining reasonable and reliable security therefor, which to a prudent mind would appear to be necessary for the protection of his own interests, and that said Fuel Company had complied with the laws of the State of Illinois regulating the sale of securities in said state; "that thereby also by the meaning of said instrument," and by necessary implication, it became defendant's duty, before certifying any of the bonds, to ascertain whether or not any property existed, or what property had been conveyed to it by

streets, privileges, franchises and other things of value, as security for its bonds to be issued under said mortgages, and that it delivered said instrument in contemplation of the latter accepted it in writing "and the mortgaging, pledging, conveying and obligations thereby become established in the [illegible] and trustee for and on behalf of all who purchase and should lend or thereafter purchase any of the bonds" of the said [illegible] company, issued under and in compliance with the terms of said mortgages, which required that said bonds, before they become valid, should be authenticated and certified by defendant; that defendant entered into and upon its duties as such trustee and thereafter issued and delivered to purchasers the [illegible] bonds of the said Company issued under said mortgage deed; that thereby and by [illegible] of said instrument and its acceptance by the defendant and by necessary implication defendant held out to purchasers of bonds issued by it under said mortgage that said Real Company had obtained a substantial amount of property of the size and amount therein [illegible], and [illegible] valuable to be reasonable security for [illegible] of the said bonds, and that defendant by necessary implication [illegible] to the said purchasers that said Real Company was [illegible] and diligence to obtain such security, and that it had [illegible] the same degree of care in obtaining [illegible] reliable [illegible] for, which to a prudent mind would appear to be necessary for the protection of his own interests, and that defendant [illegible] complied with the terms of the [illegible] of accounting [illegible] of securities in said statute "that thereby also [illegible] said instrument," and by necessary implication [illegible] duty, before certifying [illegible] any property contained, [illegible] property [illegible] by

said Fuel Company, whether there were any prior incumbrances on said property, whether said mortgage made to defendant was a first lien on the property conveyed to the defendant and whether or not there were vendors' or other liens on said property, and to see that the lettering required by the laws of said state to be placed upon bonds secured by leasehold properties or second mortgages was properly placed upon said bonds at the time of such certification and issue; that at the time in question it was the custom and practice of all persons and corporations engaged in the business of accepting and performing trusts of the same general nature as the one in question, upon the acceptance thereof, to make sure that there had been obtained under such mortgage a sufficient amount of unincumbered property of the kind therein described and of sufficient value, in the judgment of such trustee, to be reasonable security for the bonds to be certified and issued, and that if any prior loans were outstanding against said property that sufficient funds to satisfy such items were applied to such purpose, to see that the evidence of such liens was satisfied and delivered up and cancelled before the bonds described by said mortgage were issued and certified by defendant, so as to make said mortgage a first lien on said property at the time of the delivery of any bonds secured by said trust deed or mortgage, to see that the bonds were secured by the amount of property and security as designated upon the face of the bonds, or secured by said mortgage, to withhold such bonds from issue until the security thereof was known to be actually in evidence and available for the purpose of such mortgage, and to use due care for the protection of the purchasers of such bonds; that it was the duty of the defendant "upon accepting said trust" to see that the proceeds of the sale of the bonds were deposited in safe and sound banking institutions for the purpose of retiring outstanding obligations, but that the defend-

said Trust Company, whether there were any prior incumbrances on said property, whether said mortgage made to Independent was a first lien on the property conveyed to the defendant and whether or not there were vendors' or other liens on said property, and to see that the recording required by the laws of said state to be placed upon bonds secured by leasehold properties or second mortgages was properly placed upon said bonds at the time of such certification and insofar that at the time in question it was the custom and practice of all persons and corporations engaged in the business of accepting and performing trusts of the same general nature as the one in question, upon the acceptance thereof, to make sure that there had been obtained under such mortgage a sufficient amount of unencumbered property of the kind therein described and of sufficient value, in the judgment of such trustee, to be reasonable security for the bonds to be certified and issued, and that if any prior liens were outstanding against said property, that sufficient funds to satisfy such liens were applied to such purpose, to see that the evidence of such liens was validated and delivered to the counsel before the bonds described, by said mortgage were issued and certified by defendant, so as to make said mortgage a first lien on said property at the time of the delivery of any bonds secured by said trust deed or mortgage, to see that the bonds were secured by the amount of property and security as described upon the face of the bonds, or secured by said mortgage, to withhold such bonds from issuance until the security thereof was known to be actually in existence or available in the purpose of such mortgage, and to use [illegible] the protection of the purchasers of such bonds; that it was the duty of the defendant "upon accepting said trust" to see to the proper [illegible] of the bonds were deposited in safe and [illegible] institutions for the purpose of [illegible] which said bonds shown, but that the defendant

ant negligently permitted "Morris, Castings & Green, Inc.," to be designated as the bankers for said Fuel Company and to handle funds to be derived from the sale of bonds, well knowing that said corporation was a fake concern and without financial backing; that the defendant thereafter, with full knowledge of the bankrupt condition of said Fuel Company and that it had not complied with the Securities Law of the State of Illinois, with full knowledge that many of the properties described in the trust deed were not held in fee, but were only leases, and with full knowledge that there were vendors' liens outstanding against parts of said property, negligently, and with intent to deceive the public and plaintiff herein, certified bonds, which bonds were designated as "First and Refunding Bonds," as follows: "This is to certify that this is one of the bonds described in the trust deed within referred to," and thereby lent its credit and prestige as an institution created by the State, to said bonds; that defendant, in disregard of its duties, certified and issued large amounts of said bonds, which were put upon the market, when it had knowledge that said Fuel Company was bankrupt and when it knew that there were outstanding bonds in the sum of $270,000 of said Fuel Company, secured by a prior trust deed on the said property, in which defendant was trustee, and that defendant, with the said information and knowledge, negligently certified and caused to be issued Series "A" bonds of said Fuel Company; that on January 10, 1924, plaintiff, relying upon the direct and implied representations of defendant and its credibility and standing, and the presumption it had used reasonable care to protect the interests of persons purchasing said bonds, and believing said bonds to be well secured and that defendant had used reasonable care to see that said mortgage deed was a first lien upon the property described therein, and that the defendant would not certify bonds of a concern that was

and negligently permitted "Morris, Dewitmer & Green, Inc.," to be designated on the bankers for said Fuel Company and to handle funds to be derived from the sale of bonds, well knowing that said corporation was a fake concern and without financial backing; that the defendant therefore, with full knowledge of the bankrupt condition of said Fuel Company and that it had not complied with the Securities Law of the State of Illinois, with full knowledge that many of the properties described in the trust deed were not held in fee, but were only leases, and with full knowledge that there were vendors' liens outstanding against parts of said property, negligently, and with intent to deceive the public and plaintiff herein, certified bonds, which bonds were designated as "First and Refunding Bonds," as follows: "This is to certify that this is one of the bonds described in the trust deed within referred to," and thereby lent its credit and prestige as an institution created by the state, to said bonds; that defendant, in disregard of its duties, certified and issued large amounts of said bonds, which were put upon the market, when it had knowledge that said Fuel Company was bankrupt and when it knew that there were outstanding bonds in the sum of $270,000 of said Fuel Company, secured by a prior trust deed on the said property, in which defendant was trustee, and that defendant, with the said information and knowledge, negligently certified and caused to be issued Series "A" bonds of said Fuel Company; that on January 1o, 1926, plaintiff, relying upon the direct and implied representations of defendant and its credibility and standing, and the presumption it had used reasonable care to protect the interests of persons purchasing said bonds, and believing said bonds to be well secured and that defendant had used reasonable care to see that said mortgage deed was a first lien upon the property described therein, and that the defendant would not certify bonds of a concern that was

in a bankrupt and failing condition, and that no bonds had been or would be certified, issued and delivered until any outstanding bonds of said Fuel Company that were prior liens on said property had been paid and cancelled and until any and all vendors' liens had been satisfied that were prior liens upon the property designated in the mortgage deed, exchanged first mortgage bonds of the value of $10,000 for six Series "A" First and Refunding bonds of said Chicago Fuel Company, secured by said deed of trust, of the face value of $10,000; that said bonds bore the certificate of defendant, and that it knew at the time plaintiff purchased the same that they were worthless and that said Fuel Company was insolvent; that all of the assets of said Fuel Company have been sold by order of the Federal Court to satisfy receiver's certificates and prior claims that were liens against the property of said Fuel Company before and at the time said bonds were certified and issued by the defendant; "wherefore, plaintiff alleges that the bonds purchased by him were and always have been worthless, and that the defendant well knew said bonds were not a first lien and were worthless," and that plaintiff had sustained damages "on account of the negligence, wilfulness, carelessness and deceitfulness of the defendant certifying and issuing said bonds in the sum of $15,000."

The first additional count sets out the trust deed in full, which contains a copy of the bonds to be issued and the various contracts, deeds and leases conveyed to secure the same, and the count charges violations of the Illinois Securities Act in that the bonds were Class "D" securities under the Illinois Securities Law but that defendant did not qualify them under the provisions of that law, and that it aided said Fuel Company in the marketing and sale of said bonds and delivered them to the respective purchasers thereof, and that it "negligently, carelessly and deceitfully performed its

in a bankrupt and failing condition, and that no bonds had been or would be certified, issued and delivered until any outstanding bonds of said Fuel Company that were prior liens on said property had been paid and cancelled and until any and all tax-sale liens had been satisfied that were prior liens upon the property contemplated in the mortgage deed, including first mortgage bonds of the trust of $10,000 for six series "A" first and refunding bonds of said Chicago Fuel Company, secured by said deed of trust, of the face value of $10,000; that said bonds bore the certificate of defendant, and that it was at the time plaintiff produced the same that they were worthless and that said Fuel Company was insolvent; that all of the assets of said Fuel Company have been sold by order of the Federal Court to satisfy receiver's certificates and prior claims that were liens against the property of said Fuel Company before and at the time said bonds were certified and issued by the defendant; "wherefore, plaintiff alleges that the bonds purchased by him were and always were worthless, and that the defendant will know said bonds were not a first lien and were worthless," and that plaintiff had sustained damages "on account of the negligence, willfulness, carelessness and concealments on the defendant certifying and issuing said bonds in the sum of $10,000."

The first additional count sets out the bond in full, which contains a copy of the bonds to be issued and the various contracts, deeds and leases contained in the same, and the count charges violations of the Illinois Securities Act in that the bonds were Class "A" securities under the Act in question but that defendant did not qualify them under the provisions of the law, and that it aided said Fuel Company in the marketing and sale of said bonds and delivered them to the positive prejudice thereof, and that it "negligently, carelessly and knowingly performed its

duties as Trustee under said Trust Deed, and unlawfully aided and abetted the said Chicago Fuel Company, Inc., a corporation, in various ways in and about the preparation, making, execution, issuance and marketing of the said bonds and the aforesaid trust deed securing the same;" that defendant was not a naked trustee merely holding title to the property, but that it was an active trustee charged with various duties by and under the terms and provisions of said trust deed, and which it was the duty of defendant to perform with the highest degree of care as the trustee under the terms of said trust deed; that defendant accepted the trusts and duties imposed upon it by the terms of said trust deed and by law, as trustee under said trust deed. Here follow a number of allegations as to the duty of defendant "as Trustee under said Trust Deed" and the further allegation that defendant did not regard its duties as trustee under said trust deed and that it was negligent in permitting said trust deed to be issued and recorded without having a legend with red letters not less than one-half inch in height across the face and text thereof stating that said trust deed or mortgage was a junior trust deed or mortgage, and a trust deed or mortgage upon leaseholds; that defendant permitted the said bonds to be issued by said Fuel Company and to be certified by defendant without said bonds having a legend in red letters not less than one-half inch in height across the face or text of said bonds stating that said bonds were secured by a junior mortgage and by a mortgage on leaseholds, and permitted and aided and assisted in the marketing and sale of the bonds in violation of the Illinois Securities Law; that defendant permitted the bonds to be issued and sold to various purchasers, including plaintiff, when defendant knew that the security for said bonds was inadequate and that the said Fuel Company was insolvent, and was issuing and marketing the bonds in violation of law, and that

duties as Trustee under said Trust Deed, and unlawfully aided and abetted the said Chicago Title Company, Inc., a corporation, in various ways in and about the preparation, execution, execution, issuance and marketing of the said bonds, and the aforesaid trust deed securing the same; that defendant was not a mere straw man merely holding title to the property, but that it was an active trustee charged with various duties by and under the terms and provisions of said trust deed, and which it was the duty of defendant to perform with the highest degree of care as the trustee under the terms of said trust deed; that defendant accepted the trusts and duties imposed upon it by the terms of said trust deed and by law, as trustee under said trust deed. Here follows a number of allegations as to the duty of defendant "as Trustee under said Trust Deed" and the further allegation that defendant did not regard its duties as trustee under said trust deed and that it was negligent in marketing said trust deed to be issued and recorded without having a legend with rod lacking for lack thus one-half inch in width across the face and that thereof stating that said trust deed or mortgage and a junior trust deed or mortgage, and a trust deed or mortgage upon leasehold; that defendant permitted the sale bonds to be issued by said Trust Company and to be certified by defendant without bonds having a legend in red letters not less than one-half inch in height across the face or part of said bonds stating that said bonds were secured by a junior mortgage and by a mortgage on leasehold, and permitted and aided the sale bonds in the marketing and issuance of the bonds in violation of the Illinois Securities Law, [illegible] permitted the bonds to be issued and sold to various purchasers, including plaintiff, when defendant knew that the security for said bonds was inadequate and that the said trust deed and instruments and was issuing and marketing the bonds in violation of law, and that

the proceeds of the sale of said bonds were not applied to the payment and retirement of said prior bonds and obligations.

The second additional count does not set up the bonds or trust deed nor attempt to incorporate them by reference, but makes much the same allegations as the first additional count, and rescinds the sale and tenders the bonds to the defendant, and alleges that the plaintiff has sustained damages in the sum of $15,000.

Plaintiff contends that the trial court erred in sustaining the general and special demurrers to the declaration and each count thereof.

The authenticating certificate on the bonds is as follows: "This is to certify that this is one of the bonds described in the trust deed within referred to." This certificate on the bonds merely identifies the bonds as those of the Chicago Fuel Company, Inc., to secure which the trust deed was executed, and it does not guarantee the validity of the bonds nor the nature, quality or extent of the security. (See Knickerbocker v. Ft. Dearborn Trust & Savings Bank, 219 Ill. App. 409, 418, and cases cited therein; Bell v. Title Trust & Guarantee Co., 292 Pa. 228, 233; Byers v. Union Trust Co., 175 Pa. 318.) A trustee of an express trust derives his power from the instrument creating that trust and that document furnishes the measure of his obligations. (Pomeroy's Eq. Jur. (3d Ed.) Sec. 1062; 39 Cyc. 290-4; Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510; Knickerbocker v. Ft. Dearborn Trust & Savings Bank, supra, 417.) Neither the original declaration nor the second additional count sets up the trust or bond. Each of these counts alleges the execution of the trust deed, the acceptance by defendant of the trust, the alleged obligations of the defendant thereby established "as grantee and trustee" and its negligent failure to perform same. What is said in Knickerbocker v. Ft. Dearborn Trust & Savings Bank, supra:

the proceeds of the sale of said bonds were not applied to the payment and retirement of said prior bonds and obligations.

The second additional count does not set up the bonds or trust deed nor attempt to incorporate them by reference, but makes much the same allegations as the first additional count, and recounts the sale and tendered the bonds to the defendant, and alleges that the plaintiff has sustained damages in the sum of $15,000.

Plaintiff's contends that the trial court erred in sustaining the general and special demurrers to the declaration and each count thereof.

The substantiating certificate on the bonds is as follows: "This is to certify that this bond is one of the bonds described in the trust deed within referred to." This certificate on the bonds merely identifies the bonds as those of the Chicago Coal Company, Inc., to secure which the trust deed was executed, and it does not guarantee the validity of the bonds nor the mortgage, quality or extent of the security. (See Kniskerbocker v. Ft. Dearborn Trust & Savings Bank, 219 Ill. App. 408, 414, and cases cited therein; Hall v. Title Trust & Guarantee Co., 224 Ill. App. 224; Byers v. Union Trust Co., 172 Pa. 126.) A trustee of an express trust derives his power from the instrument creating that trust and that constitutes furnishes the measure of his obligations. (Commonwealth's Ed. Ins. (2d ed.) Sec. 1088; 39 Cyc. 290-4; Lynn v. Merchants Trust Co., 172 Wis. 104, 106; Kniskerbocker v. Ft. Dearborn Trust & Savings Bank, supra, 417.) Neither the original association nor the second additional count sets up the trust or bond. Each of these counts alleges the execution of the trust deed, the acceptance by defendant of the trust, the alleged obligations of the defendant, [illegible] and trustee" and the negligent failure to perform same. [illegible] said in Kniskerbocker v. Ft. Dearborn Trust & Savings Bank, supra,

(p. 417), is applicable to these counts:

> "Looking, therefore, to plaintiff's said amended statement of claim itself, it will be observed that, after stating the execution of a certain 'mortgage deed of trust' conveying to defendant, as trustee, certain property, etc., as security for certain bonds, and the acceptance by defendant of said trust, the pleader proceeds to state, not the obligations of defendant as they are set forth in the deed from which alone they must be ascertained, but merely the conclusion and inferences of the pleader as to what they are. The averment contained in paragraph 3 is that 'thereby * * * by the meaning of said instrument and by necessary implication, the defendant promised, undertook and agreed,' etc., and the averment contained in paragraph 4 is that 'thereby, also, * * * by the meaning of said instrument and by necessary implication, it became defendant's duty,' etc. We do not think that the legal effect of the instrument can be determined from what the pleader thinks it means. And some of the subsequent averments are seemingly based on the false assumption that the pleader had previously set forth, in substance, the covenants, etc., and the legal effect of the deed. As to the 'general custom and practice,' which is pleaded in paragraph 5, manifestly this cannot prevail against the terms of the deed itself. (Gilbert & Co. v. McGinnis 114 Ill. 28.)"

Plaintiff, in his reply brief, meets the foregoing principles of law by asserting that the present action "is not based on the trust deed itself, but is laid in tort for breach of duty by the defendant through which the plaintiff suffered damages" and that "all that it was necessary for the plaintiff to do in his declaration in this case was and is just what the plaintiff has done, namely, to allege the duty of the defendant and the breach of that duty and the damages resulting to the plaintiff from such breach," and in the oral argument counsel for plaintiff stated that plaintiff's case was predicated upon the alleged failure of defendant to fulfill implied duties imposed upon it by law. This contention of plaintiff is clearly an afterthought. The declaration is drafted upon the theory that when defendant accepted the trust it assumed the obligations imposed by the same and that the damages sustained by plaintiff resulted from the negligence of defendant in the performance of its said obligations. The implied duties alleged in the declaration, the pleader charges, arose from the terms of the trust deed. To illustrate: The declaration alleges that defend-

(p. 417), is applicable to these cases:

> "Leasing, therefore, to plaintiff's sole emotional state-
> ment of claim itself, it will be observed that, after recital
> the execution of a certain 'mortgage' case of trust' conveying
> to defendant, as trustee, certain property, etc., as security
> for certain debts, and the acceptance by defendant of said
> trust, the pleaded proceeds to which, and the obligations of
> defendants as they are set forth in the deed from which alone
> they must be ascertained, but merely the conclusion and in-
> ferences of the pleader as to what they are. The averment
> contained in paragraph 3 is that 'thereby * * by the creating
> of said instrument and by necessary implication, the defendant
> promised, undertook and agreed,' etc., and the averment con-
> tained in paragraph 4 is that 'thereby, also, * * * by the execu-
> ting of said instrument and by necessary implication, it became
> defendant's duty,' etc. * * * not that that the 'real effect
> of the instrument can be determined from such the pleader thinks
> it means. And none of the subsequent statements are seemingly
> based on the false assumption that the pleader had previously
> set forth, in substance, the sworn, etc., and his legal
> effect of the deed. As to the 'proper' construction, which
> which is pleaded in paragraph 5, manifestly this cannot prevail
> against the terms of the deed. Lovell, (Illinois S.Ct.), v. Hoffman
> 114 Ill. 22.)"

Plaintiff, in his reply brief, posits the contrasting principles of law by asserting that the present action "is not based on the trust deed itself, but is laid in part for breach of duty by the defendant through which the plaintiff suffered damages" [illegible] that it was necessary for the plaintiff to do in his declaration in this case was and is just what the plaintiff has done, namely, to allege the duty of the defendant and the breach of it, duty and the damage resulting to the plaintiff from such breach. [illegible] in the oral argument counsel for plaintiff [illegible] that plaintiff's cause of [illegible] the alleged failure of defendant to fulfill implied duties imposed upon it by law. This contention of [illegible] in [illegible] Charlotte [illegible]. The decisionalism in [illegible] that [illegible] the trust it assumed [illegible] imposed by [illegible] damages sustained by plaintiff [illegible] and in the performance of the duties [illegible]. The implied duties alleged in the declaration, the pleader alleges, arose from the terms of the trust deed. To illustrate, a declaration alleges that defend-

ant entered into and upon its duties as such trustee and thereafter issued and delivered to purchasers the permanent bonds of said Fuel Company issued under said mortgage deed and "that thereby and by means of said instrument and its acceptance by the defendant and by necessary implication" defendant held out to purchasers of bonds, etc. The contention of plaintiff is further weakened by the fact that in the first additional count the trust deed, that furnishes the measure of the obligations of defendant, is pleaded in full, and its terms prove that the conclusions of the pleader as to alleged obligations of defendant are not warranted by the instrument. Under the theory of the declaration or the present theory of plaintiff, the question as to whether defendant was negligent in the performance of its duties would have to be determined from the terms of the trust deed. As to the allegations in the counts respecting general custom and practice, these cannot prevail against the terms of the trust deed itself. (See Knickerbocker v. Ft. Dearborn Trust & Savings Bank, supra, 417.)

The first additional count alleges that defendant, under the terms and provisions of the trust deed, was charged with various duties and that it negligently failed to perform the same, and that plaintiff sustained damages because he relied upon defendant to perform its duties as trustee under the trust deed. The following are the material clauses in the trust deed that bear upon the question before us:

> "(c) The Trustee, save for its gross negligence or wilful default, shall not be personally liable for any loss or damage.
>
> "(d) It shall be no part of the duty of the Trustee to file or record this Indenture as a mortgage or conveyance of real estate, or as a chattel mortgage, or as a conveyance or transfer of personal property, or to renew such mortgage, or to procure any further, other or additional instruments of further assurance, or to do any other act which may be necessary to be done for the continuance of the lien hereof,

and enforce such and upon the duties as such trustee are transferred issued and delivered to purchasers the permanent bonds of said Steel Company issued under said mortgage deed and "sign trustee" and by means of said instrument and its acceptance by the purchasers are by necessary implication" (otherwise held) are to purchasers of bonds, etc. The conversion of plaintiff's interest mentioned by the trust that in the first additional issue the trust deed, that furnishes the measure of the obligations of defendants, is pledged in full, and its terms prove that the conversion of the plaintiff as to pledges obligations of defendant are not warranted by the instrument. Under the theory of the conversion or the process theory of plaintiff, the question as to whether defendant's mal negligent in the performance of its duties would have to be determined from the terms of the trust deed. As to the allegations in the complaint regarding general custom and practice, these cannot prevail against the terms of the trust deed itself. (See Allegheny-Ludlum v. Pa. Railroad Co. and Pittsburgh Steel Co., 417.)

The first additional court adopts this reasoning, where the terms and provisions of the trust deed, was charged with varying duties and that it negligently failed to perform the same, and that plaintiff contended damages because of alleged conversion in accordance with duties as stated under the trust deed. The following are the material elements in the trust deed which govern the transaction before us:

> "(a) The Trustee, save for its own negligence or willful default, shall not be personally liable for any loss or damage.
>
> "(b) It shall be no part of the duty of the trustee to file or record this indenture or any supplement of such effect, or any chattel mortgage, or any supplement or amendment of prescribed character, or to renew the same, or to pay any tax or to perform any function, either or additional in character of further assurance, or to do any thing not which may be necessary to be done for the continuance of the lien hereof,

or for giving notice of the existence of such lien, or for extending or supplementing the same. The Trustee shall not be liable for the exercise of any discretion or power hereunder, or for mistakes or errors of judgment, nor otherwise in connection with this trust, except for its own wilful misconduct or gross negligence. The Trustee shall not be obliged to take notice of any default until receipt of written notice thereof, signed by the holders of at least one-fourth in amount of the bonds outstanding hereunder, nor to take any action in respect of any default unless requested to take such action by a writing signed by the holders of not less than one-fourth in amount of the bonds hereby secured and outstanding.

"(f) The Trustee shall not be under any obligation or duty to perform any act hereunder, or to defend any suit in respect thereof, unless indemnified to its full satisfaction. * * *

"(g) The recital of facts herein and in said bonds contained shall be taken as statements by the Company (Chicago Fuel Company, Inc.), and shall not be construed as made by the Trustee.

"(i) It shall be no part of the duty of the Trustee to procure any fire or other insurance on the mortgaged property, or to renew any policies which may be procured by it or the Company, nor shall it be under any obligation to pay any taxes, assessments or other levies on the mortgaged property, or to keep itself informed with respect to any such matters.

"(k) The Trustee shall have no responsibility for the validity of this instrument, nor for the execution or acknowledgment thereof, nor of any bond secured hereby; nor for the nature, extent or amount of the security afforded hereby nor shall it be responsible for any breach by the Company (Chicago Fuel Company, Inc.) of any covenant in this Indenture contained."

The mere conclusions and inferences of the pleader as to certain alleged obligations of defendant cannot be used to change or modify the plain terms of the trust deed. The special purpose of this first additional count, however, is to charge that defendant, in the performance of its duties as trustee, under the trust deed, was guilty of a violation of the Illinois Securities Law, and in this connection plaintiff contends that "each count contains allegations of facts which show that the defendant was so closely and intimately connected with the issuance and sale of the securities here in question as to

or for giving notice of the existence of such lien, or for extending or supplementing the same. The Trustee shall not be liable for the exercise of any discretion or power hereunder, or for mistakes or errors of judgment, nor otherwise in connection with this trust, except for its own wilful misconduct or gross negligence. The Trustee shall not be obliged to take notice of any default until receipt of written notice thereof, signed by the holders of at least one-fourth in amount of the bonds outstanding hereunder, nor to take any action in respect of any default unless requested to take such action by a writing signed by the holders of not less than one-fourth in amount of the bonds hereby secured and outstanding.

"(f) The Trustee shall not be under any obligation or duty to perform any act hereunder, or to defend any suit in respect thereof, unless indemnified to its full satisfaction. * * *

"(g) The recital of facts herein and in said bonds contained shall be taken as statements by the Company (Chicago Yard Company, Inc.), and shall not be construed as made by the Trustee.

"(h) It shall be no part of the duty of the Trustee to procure any lien or other insurance on the mortgaged property, or to renew any policies which may be procured by it or the Company, nor shall it be under any obligation to pay any taxes, assessments or other levies on the mortgaged property, or to keep itself informed with respect to any such matters.

"(i) The Trustee shall have no responsibility for the validity of this instrument, nor for the execution or acknowledgment thereof, nor of any also executed hereby, nor for the manner, extent or amount of the security afforded hereby nor shall it be responsible for any breach by the Company (Chicago Yard Company, Inc.) of any covenant in this instrument contained."

The more comprehensive and interested of the pleader to a certain si- lent obligations of defendant cannot be used to change or modify the plain terms of the trust deed. The special purpose of this first additional count, however, is to charge that defendant, in the performance of its duties as trustee, under the trust deed, was guilty of a violation of the Illinois Securities Law, and in this connection plaintiff contends that "such sound contains allegations of facts which show that the defendant was so closely and intimately connected with the issuance and sale of the securities here in question -- to

make the defendant liable to the plaintiff under said Act." Under paragraph 3, sec. 5 of the Securities Act, Cahill's St. ch. 32, par. 258, subd. 3, a bank selling a security in any capacity is exempt from the provisions of the statute. (See Orr v. Croissant, 253 Ill. App. 396.) Plaintiff attempts to meet this rule of law by the further contention "that the defendant in this case while designated as 'trustee' was in fact, and as a matter of law, an 'agent' of the 'issuer,' as well as trustee under the trust deed," and plaintiff argues that there are sufficient allegations of fact in the declaration upon which to predicate a theory that the bank, acting as an agent of the Fuel Company, participated in the sale of the stock and that it stood in the shoes of the Fuel Company, when it acted in that capacity, and was subject to the provisions of the act. This contention also seems to be an afterthought. As we have heretofore stated, the declaration is drafted upon the theory that the defendant, by accepting the trust, thereby assumed certain alleged obligations and that its negligent failure to perform its duties, imposed by the trust deed, caused the damages to plaintiff. The allegation in the first additional count that defendant "permitted and aided and assisted in the marketing and sale of said bonds in violation of the Illinois Securities Law," cannot be strained into an allegation that defendant, in the capacity of an agent of the Fuel Company, sold bonds, especially in view of the special demurrers filed by defendant.

The defendant has argued at length and with considerable force that the declaration was bad for misjoinder of causes of action, for duplicity in each of its counts, and for insufficiency in the averments in each of the counts, but in the view that we have taken of the matter, we do not deem it necessary to pass

make the defendant liable to the plaintiff under s.11 Act." Under paragraph 3, sec. 3 of the Securities Act, Cap.113 R.S. ch. 32, par. 329, subd. 3, a bank selling a security in any capacity is exempt from the provisions of the statute. (See Orr v. Dominion, 20 O.L.R. App. 324.) Plaintiff attempts to meet this rule of law by the further contention "that the defendant in this case was designated as 'trustee' was in fact, and as a matter of law, an 'agent' of the 'issuer', as well as trustee under the trust deed," and plaintiff argues that there are sufficient circumstances of fact in the documents upon which to predicate a theory that the bank, acting as an agent of the Steel Company, participated in the sale of the stock and that it acted in the shoes of the Steel Company, when it acted in that capacity, and was subject to the provisions of the act. This contention also seems to be an afterthought. We have therefore stated, the contention is erected upon the theory that the defendant, by accepting the trust, thereby assumed certain alleged obligations and that the negligent failure to perform its duties, imposed by the trust deed, caused the damages to plaintiff. The allegation in the first additional count that defendant "permitted and aided and assisted in the marketing and sale of said bonds in violation of the Illinois Securities Law," cannot be stretched into an allegation that defendant, in the capacity of an agent of the Steel Company, sold bonds, contrary to the view of the special circumstances filed by defendant.

The defendant has argued at length and with considerable force that the course it was bound to pursue was dictated by the exigency in each of the counts, and for identicalness in the arrangements in each of the counts. But in the view that we have taken of the matter, we do not deem it necessary to pass

upon these contentions.

In our judgment the court did not err in sustaining the general and special demurrers to the declaration and each count thereof, and the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

upon these contentions.

In our judgment the court did not err in sustaining the general and special demurrers to the defendants and each count thereof, and the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33548

TEHAMA JANICE WRITER,
Appellee,

vs.

BERNARD W. SNOW, Bailiff of the Municipal Court of Chicago, and S. RUGENDORF,
Defendants.

S. RUGENDORF,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 619

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a trial of right of property, in the Municipal court of Chicago, before the court, without a jury, the court found the right of property in the plaintiff, Tehama Janice Writer, and entered a judgment that she have and recover from the defendants Bernard W. Snow, Bailiff of the Municipal Court of Chicago, and S. Rugendorf, defendants, the possession of a Chrysler roadster, which property had been levied upon by the said bailiff by virtue of a writ of execution issued out of said court in a certain cause wherein S. Rugendorf was plaintiff and Steve Paveltick was defendant, and which property was then in the possession of said bailiff under said levy. The defendant Rugendorf has appealed from this judgment.

The plaintiff's evidence tended to prove that she purchased the car in question from Steve Barrett (who was also known as Steve Paveltick) on August 29, 1923; that she paid, at the time, $100 in cash and agreed to pay $425 that was then due on notes secured by a chattel mortgage on the car; that she obtained from Barrett, at the same time, a bill of sale for the car; that the car was delivered to her at that time and that it thereafter remained in her possession until it was seized by the bailiff; that since the delivery of the car she has paid the Bank of America six chattel mortgage notes for $50 each, secured by said mortgage.

35869

EDWARD JAMICK WAINER, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
BERNARD W. SNOW, Bailiff of the Municipal Court of Chicago, and S. RUDENBURG, Defendants.	25E1A.619
S. RUDENBURG, Appellant.	

MR. JUSTICE SCHALLER DELIVERED THE OPINION OF THE COURT.

In a trial of right of property, in the municipal court of Chicago, before the court, without a jury, the court found the right of property in the plaintiff, Edward Jamick Wainer, and entered a judgment that he have and recover from the defendants Bernard W. Snow, Bailiff of the Municipal Court of Chicago, and S. Rugenburg, defendants, the possession of a Chrysler roadster, which property had been levied upon by the said bailiff by virtue of a writ of execution issued out of said court in a certain cause wherein S. Rugenburg was plaintiff and Steve Pavelitch was defendant, and which property was then in the possession of said bailiff under said levy. The defendant Rugenburg has appealed from this judgment.

The plaintiff's evidence tended to prove that he purchased the car in question from Steve Lunetti (who was also known as Steve Pavelitch) on August 28, 1925; that the price, $100 in cash and agreed to pay $[illegible] that was then due on notes secured by a chattel mortgage on the car; that she obtained from Barrett, at the same time, a bill of sale for the car; that the car was delivered to her at that time and that it remained remained in her possession until it was seized by the bailiff; that since the delivery of the car she has paid the sum of twelve six chattel mortgage notes for $[illegible] each, secured by said mortgage.

The appellant contends that "Steve Barrett was in possession of the Chrysler subsequent to the alleged bill of sale and had secured the license for the following year in his name. This conclusively establishes that he was the owner of the property in question." The trial court was justified in finding, under the facts of the case, that the plaintiff, and not Barrett, was in possession of the Chrysler subsequent to the alleged bill of sale. It appears that Barrett, in his own name, filed the application for the license for the car for the year 1929, that the plaintiff paid him the amount he expended for the license fee, and that she did not know that he used his own name in the application. The appellant concedes "that the issuance of license is only prima facie evidence and not conclusive and is subject to rebuttal," but he insists that under all the facts and circumstances of the case the prima facie case was not successfully rebutted by the plaintiff. The appellant has cited a number of personal injury cases in which the courts have held that where a plaintiff has shown that a license number on a vehicle at the time of the accident was issued to the defendant it made out a prima facie case of ownership of the vehicle in the defendant. In the present case, the evidence shows that the plaintiff, a working girl, did not know that Barrett had applied for the license in his own name, but, assuming that the appellant made out a prima facie case of ownership in Barrett by proof that he applied for the license in his own name, nevertheless we are satisfied that the evidence of the plaintiff entirely rebuts the presumption raised by the linense that was issued upon such application.

While Mr. Malkin, one of the attorneys for the appellant, was on the stand testifying for him, the following occurred: "Mr. Malkin (attorney for appellant): What conversation did you have, if any, with Mr. Barrett at the time the levy was made? The Court: Are you objecting? Mr. Smith (counsel for plaintiff): Yes. The Court: Objection sustained. Q. When you arrived at the garage

The appellant contends that Steve Barrett was in possession of the Chrysler subsequent to the alleged bill of sale and had secured the license for the following year in his name. This conclusively establishes that he was the owner of the property in question." The trial court was justified in finding, under the facts of the case, that the plaintiff, and not Barrett, was in possession of the Chrysler subsequent to the alleged bill of sale. It appears that Barrett, in his own name, filed the application for the license for the car for the year 1929, that the plaintiff paid his the amount he expended for the license fee, and that she did not know that he used his own name in the application. The appellant concedes "that the issuance of license is only prima facie evidence and not conclusive and is subject to rebuttal," but he insists that under all the facts and circumstances of the case the prima facie case was not successfully rebutted by the plaintiff. The appellant has sued a number of personal injury cases in which the courts have held that where a plaintiff has shown that a license number on a vehicle at the time of the accident was issued to the defendant it made out a prima facie case of ownership of the vehicle in the defendant. In the present case, the evidence showed that the plaintiff, a working girl, did not know that Barrett had applied for the license in his own name, but, assuming that the appellant made out a prima facie case of ownership in Barrett by proof that he applied for the license in his own name, nevertheless we are satisfied that the evidence of the plaintiff ordinarily rebuts the presumption raised by the license that was issued upon such application.

While Mr. Smith, one of the attorneys for the appellant, was on the stand testifying for him, the following occurred: "Mr. Smith (attorney for appellant): What conversation did you have, if any, with Mr. Barrett at the time the levy was made? The Court: Are you objecting? Mr. Smith (counsel for plaintiff): Yes. The Court: Objection sustained. Q. When you arrived at the garage

did Mr. Barrett claim title to the car? A. He did. Q. What did he say? Mr. Smith: I object to such statement. The Court: Objection sustained." The appellant contends that the court erred in sustaining the objection to the last question. In the argument in support of this contention the appellant assumes that the proof shows that Barrett was the agent of the plaintiff and that therefore the appellant had the right to show by the witness that Barrett at the time of the levy, the plaintiff not being present, stated that he was the owner of the car and that such statement would be binding on the plaintiff, Barrett's alleged principal. Such a contention requires no answer. Moreover, it appears that when the objection was sustained, the appellant made no offer as to what he expected to prove by the witness. He is, therefore, in no position to claim that he was hurt by the ruling of the court.

We are satisfied that the judgment in the present case is a just one and that it should be, and it is, affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

did Mr. Barrett claim title to the car? A. He did. Q. What did he say? Mr. Smith: I object to such statement. The Court: Objection sustained." The appellant contends that the court erred in sustaining the objection to the last question. In the argument in support of this contention the appellant assumes that the proof shows that Barrett was the agent of the plaintiff and that therefore the appellant had the right to show by the witness that Barrett at the time of the levy, the plaintiff not being present, stated that he was the owner of the car and that such statement would be binding on the plaintiff, Barrett's alleged principal. Such a contention requires no answer. Moreover, it appears that when the objection was sustained, the appellant made no offer as to what he expected to prove by the witness. He is, therefore, in no position to claim that he was hurt by the ruling of the court.

We are satisfied that the judgment in the present case is a just one and that it should be, and it is, affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

52a

33569

255 I.A. 619

WILLIAM W. WITTY,
Appellee,

v.

SECURITY TRUST & DEPOSIT CO.,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

William W. Witty, plaintiff, sued Security Trust & Deposit Company, a corporation, defendant, in the Circuit Court of Cook County, for attorney's fees claimed to be due him. There was a trial before the court, with a jury, and a verdict returned in favor of the plaintiff in the sum of $3,250. Judgment was entered on the verdict and the defendant has appealed. The plaintiff has not filed a brief in this court.

The defendant pleaded the general issue and filed, in support of the same, an affidavit of merits. Thereafter, by leave of court, it filed an amended affidavit of merits in which it averred that it had a good defense upon the merits as to $7,500 of plaintiff's claim; that the defendant was not liable to the plaintiff in any manner except for certain services rendered by the plaintiff as an attorney at law to the defendant upon a special contract in which the amount of plaintiff's compensation was fixed at $100 per day for time employed in court and that no more than ten days were so employed, and that no more than $1,000 was due to the plaintiff.

In August, 1921, a robbery occurred at the safety deposit vaults of the defendant company and thereafter six suits at law were brought by various box holders to recover from the defendant

33869

WILLIAM E. WITTY,
Appellee,

v.

SECURITY TRUST & DEPOSIT CO.,
a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

William E. Witty, plaintiff, sued Security Trust & Deposit Company, a corporation, defendant, in the Circuit Court of Cook County, for attorney's fees claimed to be due him. There was a trial before the court, with a jury, and a verdict returned in favor of the plaintiff in the sum of $3,000. Judgment was entered on the verdict and the defendant has appealed. The plaintiff has not filed a brief in this court.

The defendant pleaded the general issue and filed, in support of the same, an affidavit of merits. Thereafter, by leave of court, it filed an amended affidavit of merits in which it averred that it had a good defense upon the merits as to $3,000 of plaintiff's claim; that the defendant was not liable to the plaintiff in any manner except for certain services rendered by the plaintiff as an attorney at law to the defendant upon a special contract in which the amount of plaintiff's compensation was fixed at $100 per day for time employed in court and that no more than ten days were so employed, and that no more than $3,000 was due to the plaintiff.

In August, 1923, a judgment creditor of the surety deposit vaults of the defendant company was garnisheed. Six suits at law were brought by various bar lawyers to recover from the defendant

the contents of their respective safety deposit boxes.

The plaintiff sued to recover fees for services in the following cases: Grossman Shoe Co. v. Security Trust & Deposit Co., Foster v. Security Trust & Deposit Co., Lipschultz v. Security Trust & Deposit Co., Zorn v. Security Trust & Deposit Co., On v. Security Trust & Deposit Co., Luzzo v. Security Trust & Deposit Co., German Hod Carriers' Union v. Security Trust & Deposit Co. and People v. Jones et al. It was conceded by the defendant, on the trial, that whatever court work the plaintiff did in the said cases, he was authorized by the defendant to do and that the only question in the case, save the one as to how the compensation should be determined, was, what actual time was spent in court in those cases. As to the amount of compensation, the plaintiff claimed (a) that he was entitled to reasonable compensation for all services that he rendered in the cases, and (b) that the plaintiff's claim was upon an account stated. The defendant contended that there was a special contract between the parties that fixed the plaintiff's compensation at the rate of $100 a day for actual time spent in court and that he was to be allowed nothing for other work done on the cases.

At the conclusion of the plaintiff's case, and again at the conclusion of all the evidence, the defendant moved the court to instruct the jury to find the issues for the plaintiff and to fix his damages at the sum of $1,000. Both motions were denied, and the defendant excepted to the action of the court in denying the motions.

The defendant thus states its position in this court:

> "The uncontradicted evidence being that there was a contract between the parties fixing the attorney's fees at the rate of $100 a day for the time spent in court only and no more. The positive evidence (plaintiff's own evidence) is that no more than ten days were spent in court and that $1,000 is due to the plaintiff. There cannot be a contract

the contents of their respective entry deposit boxes.

The plaintiff sued to recover fees for services in the following cases: Grossman Chem. Co. v. Security Trust & Deposit Co., Porter v. Security Trust & Deposit Co., Simonelli v. Security Trust & Deposit Co., Kern v. Security Trust & Deposit Co., Co v. Security Trust & Deposit Co., Mason v. Security Trust & Deposit Co., Gorman Red Cross' Union v. Security Trust & Deposit Co. and Pogsie v. Jones et al. As was noticed by the defendant, on the trial, when whatever court was the plaintiff sue in the said cases, he was authorized by the defendant to do so and that the only question in the case, save the one as to how the compensation should be determined, was, what reasonable time was spent in court in those cases. As to the amount of compensation, the plaintiff claims: (a) that he was entitled to reasonable compensation for all services that he rendered in the cases, and (b) that the plaintiff's claim was upon an express contract. The defendant contended that there was a special contract between the parties that fixed the plaintiff's compensation at the rate of $[illegible] a day for actual time spent in court and that he was to be allowed nothing for other work done on the cases.

At the conclusion of the plaintiff's case, and again at the conclusion of all the evidence, the defendant moved the court to instruct the jury to find the issues for the plaintiff and to fix his damages at the rate of $[illegible] per day for actual time in court, and the defendant excepted to the action of the court in overruling the motions.

The defendant then at [illegible] in this court:

"The uncontradicted evidence being that there was a contract between the parties fixing the attorney's fees at the rate of $100 a day for the time spent in court only and no more. The positive evidence of the plaintiff's own witness is that he was in court ten days and spent in court at that $1,000 is due to the plaintiff. There was [illegible] in a county at

> both express and implied, pertaining to the same subject matter, existing at the same time. The express contract eliminates any possibility of an implied contract. We submit that, even on the theory that there was an implied contract, under the competent evidence in the case the largest amount plaintiff is entitled to recover is $1,300. The largest sum as plaintiff's compensation under the competent evidence is not to exceed $1,500 on account of which he admits receiving $200. The verdict of the jury was therefore contrary to the evidence."

The affidavit of merits of the defendant averred "that the defendant has not become liable to the plaintiff in any manner except for certain services as attorney at law rendered by said plaintiff to the defendant upon a special contract, fixing the amount of compensation at $100 per day for time employed in court." The plaintiff introduced this affidavit as part of his case and it is the only evidence in the case that relates to the terms of employment of the plaintiff. The contention of the plaintiff, made during the trial, that his claim had become an account stated and that the amount due was therefore fixed, cannot be sustained. (See Henry et al. v. Le Moyne, 219 Ill. App. 313, and cases cited therein.) In our view of the case the only question for us to determine is, how many days did the plaintiff spend in court in the trial of the aforesaid cases. The defendant practically concedes, as we read its statement, that there is competent evidence tending to show that he was entitled to charge $1,500. We have carefully read the evidence of the plaintiff bearing upon the instant question and we are satisfied that it shows that he spent three days in court in the trial of the Grossman Shoe Co. case; four days in the Superior Court in the trial of the Foster case (there were two trials of this case) and one day in the Appellate Court, when the case was there on appeal; three days in court in the trial of the Lipschultz case; two and one-half days in court in the trial of the On case; two days in court in the trial of the Luxze case; two and one-half days in court in the trial of the German Hod Carriers' Union case, and two days

> both express and implied, pertaining to the same subject matter, existing at the same time. The express contract eliminates any possibility of an implied contract. We submit that that, even on the theory it there was an implied contract, under the competent evidence in the case the Interest amount plaintiff is entitled to recover is $1,300. The Interest amount as plaintiff's compensation under the competent evidence is not in excess $1,300 on account of which he submits reversing this. The weight of the jury was therefore contrary to the evidence."

The attitude of motion of the criminal statutes "that the defendant can not become liable to the plaintiff in any manner except in certain services as authorized by said plaintiff to the defendant upon a special contract, fixing the amount or compensation at $300 per day for time employed in court." The plaintiff introduced this affidavit as part of his case and it is the only evidence in the case in relation to the terms of employment of the plaintiff. The contention of the plaintiff, made during the trial, that his claim had become a fixed amount based upon the amount due [illegible] therefore fixed, cannot be sustained. (See Kenny vs. Ex parte, [illegible] 1 Ala. 1, and cases cited therein.) In our view of the case the only question [illegible] is to a fixing the number of days the plaintiff spent in court in the trial of the aforesaid cause. The defendant [illegible] contends, as we read its statement, that there is competent evidence to show that he was employed for [illegible] days. We have carefully [illegible] the evidence of the plaintiff, [illegible] and [illegible] in the trial of the Cleaver case [illegible] days in the Foster case in the trial of the Foster case [illegible] and one day in the [illegible] case [illegible] days in court in the trial of the Alexander case [illegible] half days in court in the trial of the [illegible] and [illegible] in the trial of the Lamb case [illegible] in the trial of the Barron and Lamb v. Tolbert case [illegible]

in court in the trial of People v. Jones et al. The defendant introduced no evidence to contradict or impeach the plaintiff's evidence in the matter of time spent in the trial of cases. The total time, therefore, spent by the plaintiff in court in the trial of cases was twenty days, and at $100 per day, the total amount for which the plaintiff was entitled to compensation was $2,000. It is conceded that he received $200 on account of services rendered, and therefore the net amount due the plaintiff from the defendant is $1,800.

The defendant has argued that certain errors were committed by the trial court, but in our opinion it is unnecessary to consider these.

Accordingly, if within ten days the plaintiff files in this court a remittitur of $1,450, the judgment against the defendant will be affirmed for $1,800; otherwise it will be reversed and the cause remanded to the Circuit Court of Cook County for another trial.

AFFIRMED FOR $1,800 ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

in court in the trial of Ingels v. Jones et al. The defendant introduced no evidence to contradict or impeach the plaintiff's evidence in the matter of time spent in the trial of cases. The total time, therefore, spent by the plaintiff in court in the trial of cases was twenty days, and at $100 per day, the total amount for which the plaintiff was entitled to compensation was $2,000. It is conceded that he received $400 on account of services rendered, and therefore the net amount due the plaintiff from the defendant is $1,600.

The defendant has argued that certain errors were committed by the trial court, but in our opinion it is unnecessary to consider these.

Accordingly, it which has been the plaintiff's claim in this court a remittitur of $400, the judgment against the defendant will be affirmed for $1,600; otherwise it will be reversed and the cause remanded to the circuit Court of Scott County for another trial.

AFFIRMED FOR $1,600 OR REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Hanna, P. J., and Crialey, J., concur.

33578 53a

255 I.A. 619

THE T. A. SNIDER PRESERVE COMPANY, a corporation, for the use of Hartford Accident & Indemnity Company, a corporation,
Appellant,

v.

THE PEOPLES TRUST & SAVINGS BANK OF CHICAGO, a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, The T. A. Snider Preserve Company, a corporation, for the use of Hartford Accident & Indemnity Company, a corporation, plaintiff, sued The Peoples Trust & Savings Bank of Chicago, a corporation, defendant, in an action of assumpsit to recover the sum of $2,236.08, with interest. The case was tried before the court, with a jury, and after the evidence of both parties had been heard, the court, upon motion of the defendant, directed a verdict for it. Judgment was entered on the verdict and this appeal followed.

The plaintiff filed the common counts and also an affidavit of claim setting forth that the defendant was engaged in the general banking business in Chicago and that the plaintiff, The T. A. Snider Preserve Company, was one of its depositors; that between May 4, 1926, and December 6, 1926, plaintiff drew certain checks on the defendant bank, payable to the order of "David Myron," in various amounts, aggregating $2,236.08; that each of the checks was subsequently paid by the defendant to an unauthorized person or persons upon the forged and unauthorized indorsement of the name of the payee, and the payments so made charged to the account of the plaintiff; that the beneficial plaintiff, Hartford Accident & Indemnity

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THE T. A. SNITZER PRESERVE COMPANY,
a corporation, for the use of
Hartford Accident & Indemnity
Company, a corporation,
Appellees,

v.

THE PEOPLES TRUST & SAVINGS BANK
OF OHIO.DO, a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRANCIS MALLY FOR THE COURT OF THE COURT.

In the Superior Court of Cook County, The T. A. Snitzer Preserve Company, a corporation, for the use of Hartford Accident & Indemnity Company, a corporation, plaintiff, sues The Peoples Trust & Savings Bank of Chicago, a corporation, defendant, in an action of assumpsit to recover the sum of $2,000.00, with interest. The case was tried before the court, with a jury, and after the evidence of both parties had been heard the court, upon motion of the defendant, directed a verdict for it. Judgment was entered on the verdict and this appeal followed.

The plaintiff filed the common counts and also an affidavit of claim setting forth that the defendant was engaged in the general banking business in Chicago and that the plaintiff, The T. A. Snitzer Preserve Company, was one of its depositors; that between July 4, 1926, and December 6, 1926, plaintiff drew certain checks on the defendant bank, payable to the order of "Carl Ryan," in various amounts, aggregating $2,000.00; that each of the checks was a bona-fide check; that the defendant is an unauthorized person or persons upon the forged and unauthorized indorsement of the name of the payee, and the payments so made charged to the account of the plaintiff; that the beneficial plaintiff, Hartford Accident & Indemnity

Company, was thereupon obliged to, and did, by virtue of a contract of indemnity with the plaintiff, pay to it on June 16, 1927, the sum of $2,236.08, and, upon such payment, became subrogated to the rights of said Preserve Company against said bank, and also received from said last mentioned company a formal written assignment of all its claims, etc. The defendant filed seven amended pleas, the first of which was the general issue. Demurrers were sustained as to the second, third and fifth. The fourth averred a universal custom of banks to keep no record of the payment of checks except the date of acceptance and payment, and the amount paid and charged against the account of the depositor, but to state a monthly account with the depositor and return to the depositor with such statement all checks and vouchers charged against his account, and that it was a part of such universal custom for the depositor to promptly examine such statement and checks or vouchers, and to promptly notify the bank of any discrepancy therein and to promptly return to the bank any repudiated check or voucher with an affidavit stating specifically the depositor's objection thereto; that in the absence of the repudiation of any check in such manner all payments set forth in such statement of account become proper charges against the depositor's account; that the plaintiff, by opening an account with the defendant acquiesced in such custom and practice, and that it did not so repudiate and return to the defendant bank any checks now claimed to have been improperly charged against its account. The sixth amended plea averred that Paul H. Hart was plaintiff's sales manager for the Philadelphia territory and that he, in the regular course of business, selected and employed salesmen, etc., and approved their salaries and expense items, and that it was within the scope of his duties to make out payroll lists and payroll checks for plaintiff and transmit such checks to plaintiff's office at Rochester, New York, for signature;

company, was thereupon obliged to, and did, by virtue of a contract of indemnity with the plaintiff, pay to it on June 16, 1927, the sum of $[illegible], and, upon such payment, became subrogated to the rights of said Fireman's Company against said bank, and did receive from said last mentioned company a transfer of said claim, and all the claims, and the evidences of said claim mentioned above, the first of which was the general ledger. Thereupon suit was commenced on the account, which was filed. The court sustained a demurrer which of banks to keep the record of the payment of checks drawn by them made or acceptance and payment, and the usual pass and stamps upon the account of the depositor, but [illegible] a monthly account also the depositor and [illegible] the depositor with such account all checks and vouchers showing [illegible] and to be a [illegible] part of such interest [illegible] to [illegible] to [illegible] and to [illegible] the same of any discrepancy [illegible] to [illegible] to have any [illegible] check or voucher with [illegible] objection interest [illegible] check in [illegible] account [illegible] the plaintiff, by [illegible] in such [illegible] payroll [illegible] [illegible] checks to plaintiff's [illegible] [illegible] [illegible]

that in the course of such employment he padded the plaintiff's payroll list by adding thereto the fictitious name of "David Myron," a non-existing person, known to the plaintiff and said Hart to be such, and that Hart prepared the checks in controversy, payable to said "Myron," and sent such checks to plaintiff's office at Rochester for signature, where they were signed and afterwards returned to said Hart, who thereupon, without authority, indorsed the name of said "Myron" thereon, cashed them and misappropriated the proceeds thereof; that said checks were afterwards charged to plaintiff's account; that said checks, though nominally payable to "Myron," were, as a matter of law, payable to bearer. The seventh amended plea contains the same averments as the sixth and adds that if the plaintiff, during the time in question, had duly examined its payroll lists and had compared said lists with the monthly bank statements and vouchers submitted by the defendant to the plaintiff during the time in question the forged indorsements would have been immediately discovered, and that plaintiff's failure to do so made a continuance of such forged indorsements possible. Plaintiff filed replications to the fourth, sixth and seventh amended pleas.

The evidence showed (inter alia) that plaintiff The T. A. Snider Preserve Company, conducted a large business throughout the country and that its gross sales during the year 1926 amounted to $4,729,355.03; that it employed between 250 and 300 salesmen, district managers, stock clerks and warehousemen, and, in addition thereto, clerical help to the number of 150; that it was a large depositor of the defendant bank and on January 1, 1927, had a surplus balance of $660,457.19; that Paul M. Hart was employed by plaintiff as district sales manager for its Philadelphia territory; that he engaged the salesmen, stenographers, warehousemen and truckmen for that district, approved all of their salary and expense items, and controlled the activities of these employees in general; that he

that in the course of such employment he padded the plaintiff's payroll list by adding thereto the fictitious name of "David Byron," a non-existing person, known to the plaintiff and said Hart to be such, and that Hart procured the checks in consideration, partly to said "Byron," and cash checks to plaintiff's office as commission for signature, where they were signed and efficiently removed to said Hart, who thereupon, without validity, indorsed the name of said "Byron" thereon, cashed them and misappropriated the proceeds thereof; that said checks were afterwards charged to plaintiff's account; that said checks, though nominally payable to "Byron," were, as a matter of fact, payable to bearer. The certain unsecured plaintiff, during the time in question, had only authorized the payroll checks, and the company did likewise with the understanding that no checks were issued by the defendant to the plaintiff, during the time in question the forged indorsements could have been immediately discovered, and that plaintiff's failure to do so made a continuance of such forged indorsements possible. Plaintiff filed replies thereto to the fourth, sixth and seventh amended pleas.

The evidence shows (Exhibit [illegible]) that plaintiff, a [illegible] under Preserve Company, contracted a large surety [illegible] the country and that its gross sales during the [illegible] to $4,720,288.03; that it employed a [illegible] tributor managers, stock clerks and salesmen, [illegible] thereto, district help in the number of [illegible] dependent of the defendant bank and on January 1, 1[illegible] balance of $880,497.19; that [illegible] as district sales manager for [illegible] engaged the salesmen, stenographers, [illegible] for that district, approved all of their activity and expense [illegible], and controlled the activities of these employees in general [illegible]

approved the salesmen's reports of sale and expense vouchers and sent the same to the Rochester office of the plaintiff, where pay checks, based on such sales reports, were then made out and signed and sent to the payees thereof; that between May 4, 1926, and December 6, 1926, Hart made out pretended sales reports of a fictitious person, designated as "David Myron," giving his address at various hotels throughout the country; that these reports were sent to the Rochester office, together with other genuine reports, for the purpose of having pay checks issued thereon by the officers of the company; that the officials who signed and countersigned the checks made payable to "David Myron" had no knowledge that the payee was a fictitious person; that Hart would then cash these checks at various places in the United States; that in some instances he secured personal indorsements, while in others the checks bear the indorsement of the name of the fictitious payee only; that these checks were in due course presented to the defendant bank, upon which they were drawn, and the defendant honored them and charged them against the account of its depositor, T. A. Snider Preserve Company; that monthly statements, with the cancelled checks attached, were sent to the plaintiff; that the forgeries were not discovered by the plaintiff until March or April, 1927; that Hartford Accident & Indemnity Company issued to the plaintiff a bond insuring it against dishonest acts of Hart and that when the forgeries were discovered the plaintiff filed a claim against said Indemnity Company for the amount of the forged checks and said Indemnity Company paid the claim in full; that the defendant bank collected from prior indorsers the amount of three of the forged checks, aggregating $207.02.

It is apparent from the record and from the arguments of the parties in this court that the controlling question before the trial court, on the motion to direct a verdict, was the alleged

approved the salesman's reports of sale and expense vouchers and sent the same to the home office of the plaintiff, where they checked, based on such sales reports, were then made out and mailed and sent to the payees thereof; that between July 1, 1933, and December 6, 1936, Hart made out purchases sales reports of a fictitious person, designated as "Davis Grocery," giving his address as various hotels throughout the country; that these reports were sent to the home office, together with other genuine reports, for the purpose of having my checks issued thereon by the officers of the company; that the officials who signed and countersigned the checks made payable to "Davis Grocery" had no knowledge that the payee was a fictitious person; that Hart [illegible] such checks at various places in the United States; that in some instances he received personal indorsements, while in other a who checks bear the indorsements of the name of the fictitious payee, only; that these checks were in due course presented to the defendant bank, upon which they were drawn, and the defendant accepted them and charged them against the account of the depositor, [illegible] Frozenwax Company; that the company, however, with the exercise of ordinary care, would have discovered the fraud, and would have given the plaintiff notice of the forgeries, [illegible] by the plaintiff until after [illegible] 1937; that Harvey [illegible] a defendant company issued to [illegible] a bond indemnifying it against dishonest [illegible] or Hart and that [illegible] covered the plaintiff [illegible] for the amount of the checks and [illegible] company paid the claim in full; that the defendant [illegible] indorsers the amount [illegible] the forged checks, aggregating $207.02.

It is apparent from the record and [illegible] of the parties in this court that the controlling question before the trial court, on the motion to dismiss [illegible], was the alleged

negligence of the plaintiff. The defendant contends that "there can be no recovery in this case because the negligent and careless conduct of the Snider Preserve Company caused the losses complained of." The plaintiff contends that "the Snider Preserve Company was not negligent or careless in the conduct of its business." It has been well stated that no rule can be laid down that will cover every transaction between a bank and its depositor, and whethe or not a depositor has been negligent, must be determined by the facts and circumstances of the particular case. After a careful consideration of all the evidence bearing upon the instant question, we are satisfied that there was evidence tending to show that the plaintiff had exercised that degree of care which, under all the circumstances, it was its duty to do. If the case had been submitted to the jury and they had determined the instant question in favor of the plaintiff, in our judgment, the defendant could not have fairly argued that the verdict, in that regard, was unsupported by evidence. On the other hand, we think that the defendant had the right to argue, from certain circumstances in evidence, that the plaintiff was negligent and that such negligence caused the losses complained of. In our judgment, the trial court erred in not submitting the question of the alleged negligence of the plaintiff to the jury. As this case will probably be tried again, we refrain from citing and commenting on the evidence in the record bearing upon the instant question.

The defendant argues, however, that if the question of the alleged negligence of the plaintiff is determined adversely to its contention, nevertheless, the judgment should be sustained. We shall refer to the several points made in support of this contention.

negligence of the plaintiff. The defendant contends that "there can be no recovery in this case because the negligent and careless conduct of the Zeider Treasure Company caused the losses complained of." The plaintiff contends that "the Zeider Treasure Company was not negligent or careless in the conduct of its business." It has been well stated that no rule can be laid down that will cover every transaction between a bank and its depositor, and whether or not a depositor has been negligent, must be determined by the facts and circumstances of the particular case. After a careful consideration of all the evidence bearing upon the instant question, we are satisfied that there was evidence tending to show that the plaintiff had exercised such degree of care which, under all the circumstances, it was its duty to do. If the case had been submitted to the jury and they had determined the instant question in favor of the plaintiff, in our judgment, the defendant could not have fairly argued that the verdict, in that regard, was unsupported by evidence. On the other hand, we think that the defendant had the right to argue, from certain circumstances in evidence, that the plaintiff was negligent and that such negligence caused the losses complained of. In our judgment, the trial court erred in not submitting the question of the alleged negligence of the plaintiff to the jury. The instant case will probably be tried again, so refrain from citing and commenting on the evidence in the record bearing upon the instant question.

The defendant argues, however, that if the question of the alleged negligence of the plaintiff is determined adversely to its contention, nevertheless, the judgment should be sustained. We shall refer to the several points made in support of this contention.

The defendant contends that an account stated was struck between the defendant and the plaintiff, and it cites certain cases in which it is held that where a bank statement, to which are attached cancelled checks, is sent by a drawee bank to its depositor and no objection is made by the depositor to such statement an account stated is created between the parties. However, the general rule is that an account stated is open to correction for mistake or fraud. (See Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 107, and cases cited therein.) The defendant further contends that the plaintiff is now estopped from disputing the correctness of the bank statements showing the payment of such checks, because of its delay in notifying the defendant of the defalcations of Hart and of the forgery of the indorsements on the checks, and it cites in support of this contention certain cases holding that an unreasonable delay in notifying the bank of the forgery after a party has discovered the same will preclude recovery. We do not think that this rule applies to the facts of the instant case, but, in any view of the evidence, the most that the defendant could properly ask would be that the jury should be allowed to determine, from all the facts and circumstances, the question as to whether or not there had been an unreasonable delay. The plaintiff strenuously argues that the defendant did not specially plead laches and is therefore in no position to raise the last contention, but we do not deem it necessary to pass upon this point.

The defendant next contends that "the defendant bank paid the checks drawn upon it by the Snider Preserve Company in accordance with the tenor of the instruments, and, therefore there can be no recovery against it." We find no merit in this contention. The checks in question were payable to "David Myron." As there was no such person as "David Myron" it cannot be fairly argued that the bank paid the checks in strict accordance with the tenor of the

The relevant evidence shows that no agreement [illegible] was entered between the defendant and the plaintiff, nor is there certain [illegible] in which it is held in [illegible] a [illegible] statement, [illegible] which are attached conditions [illegible], [illegible] by a [illegible] bank [illegible] and no objection is made by the depositor to such [illegible] account stated is entered between the parties. [illegible] the general rule is that an account stated is open to correction for mistake or fraud. (See London Manufacturing Bank v. Kinney, 127 U. S. 40, 107, and cases cited therein.) The defendant further contends that the plaintiff is not estopped from disputing the statements of the bank statements according the payment of such checks, because of the delay in notifying the defendant of the defalcations of Mary and of the forgery of the instruments on the checks, and is also in support of this contention contends a [illegible] and [illegible] able delay in notifying the [illegible] of the forgery after a forgery has discovered [illegible] recovery. [illegible] that this rule applies to the [illegible] of the instrument [illegible], but in my view of the evidence, the most that [illegible] of [illegible] would be that [illegible] facts and circumstances, [illegible] been an unreasonable delay. [illegible] the defendant [illegible] position to raise the last contention, [illegible] necessary to pass upon this point.

The [illegible] the checks upon it by the [illegible] with the [illegible] of the instrument, [illegible] recovery against it." [illegible] checks in question are payable to "Davis Bryant," [illegible] each person as "Davis Bryant" [illegible] bank paid the checks in [illegible]

instruments. But the defendant further argues that the plaintiff had knowledge, actual or constructive, that the payee named in the checks was fictitious, and therefore the checks were payable to bearer, under Sec. 29 (3), Chap. 98, Cahill's Ill. Rev. Stat. There is no merit in this contention. There was no intention on the part of the plaintiff that the payee in the checks should be regarded as a fictitious person, even if it could be held that such was the criminal intention of Hart, the unfaithful employee. However, Hart indorsed the name "David Myron" on each of the checks and neither he nor the bank treated them as being payable to fictitious persons or to bearer. As the checks were not put into circulation by the plaintiff with knowledge that the name of the payee did not represent a real person, section 29 does not apply. (See U. S. Cold Storage Co. v. Central Mfg. Dist. Bank, 251 Ill. App. 279, 284.)

The defendant next contends that "there is no competent evidence in the record to sustain the Hartford Accident & Indemnity Company's right to maintain this suit." The suit is not brought by the Hartford Accident & Indemnity Company but by the Snider Preserve Company. The words "for the use of" are of no legal effect whatsoever except to show that the usee has an equitable interest in the funds after the same have been collected. (Hobson v. McCambridge, 130 Ill. 367, 375; Tedrick v. Wells, 152 Ill. 214, 217.)

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

instruments. But the defendant further argues that the plaintiff had knowledge, actual or constructive, that the payee named in the checks was fictitious, and therefore the checks were payable to bearer, under sec. 46 (3), chap. 98, Revised Stat. 1927. There is no merit in this contention. There was no indication on the part of the plaintiff that the payee in the checks should be regarded as a fictitious person, even if it could be held that such an intentional misnaming of that, the unfaithful employee. However, that indorsed the name "David Byron" on each of the checks and neither he nor the bank knew there is such payable to fictitious persons or to bearer. As the checks were not into circulation by the plaintiff with knowledge that the name on the payee did not represent a real person, section 46 does not apply. (See G. C. Gold Storage Co. v. Imperial Ins. Co., 98 Ill. App. 479, 480.)

The defendant more contends that "there is no competent evidence in the record to establish the Northern Realty & Indemnity Company's rights to maintain this suit." The fact is not brought by the further, with no indemnity company by the Northern Indemnity Company. The words "for the use of" are of no legal effect whatever except to show that the name is a mere interest in the funds after the checks have been cashed. (Hogan v. Cunningham, 220 Ill. 327, 329; Martin v. Wing, 108 Ill. App. 124.)

The judgment of the superior court of Cook county is reversed and the cause is remanded.

Reversed and remanded.

Barnes, P. J., and Wilson, J., concur.

33587

W. C. HANDLEY,
Appellee,

vs.

E. H. ROBINSON,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 I.A. 620

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, plaintiff, W. C. Handley, sued defendant, E. H. Robinson. On March 14, 1929, judgment for $2,300 was entered as in case of default after defendant's amended affidavit of merits and also his plea had been stricken from the files on motion of plaintiff. Defendant has appealed.

Defendant contends that "the demurrer to the defendant's amended special pleas and additional pleas was improperly sustained." Defendant cannot raise this contention for the reason that the record shows that the demurrer to defendant's special pleas was sustained on January 16, 1929, that on February 28, 1929, plaintiff filed an amended affidavit of claim, and on March 12, 1929, amended his declaration, that on March 14 defendant filed an amended affidavit of merits and that the only plea of defendant then on file was the amended plea of the general issue.

Defendant contends that "the defendant's amended plea and amended affidavit of merits were improperly stricken from the files."

The declaration, as amended, contains four counts, viz.: (1) the common counts; (2) alleges the indorsement and assignment of a promissory note by defendant to plaintiff, the confession of judgment thereon before maturity against the original maker and his guarantors, the failure of the maker and his guarantors

55507

W. C. HANDLEY,
Appellee,

vs.

E. H. ROBINSON,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2551 I.A. 520

MR. JUSTICE MCSMIRAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, plaintiff, W. C. Handley, sued defendant, E. H. Robinson. On March 14, 1929, judgment for $2,300 was entered in in case of default after defendant's amended affidavit of merits and also his plea had been stricken from the files on motion of plaintiff. Defendant has appealed.

Defendant contends that "the demurrer to the defendant's amended special pleas and additional plea was improperly sustained." Defendant cannot raise this contention for the reason that the record shows that the demurrer to defendant's special pleas was sustained on January 16, 1929, that on February 26, 1929, plaintiff filed an amended affidavit of claim, and on March 12, 1929, amended his declaration, that on March 14 defendant filed an amended affidavit of merits and that the only plea of defendant then on file was the amended plea of the general issue.

Defendant contends that "the defendant's amended plea and amended affidavit of merits were improperly stricken from the files."

The declaration, as amended, contains four counts, viz.: (1) the common counts; (2) allages the indebtedness and assignment of a promissory note by defendant to plaintiff, the conversion of judgment thereon before maturity against the maker and his guarantors, the failure of the maker and his guarantors

to make payment in accordance with the terms of the note, the issuance of an execution and a levy on the property of the guarantors, a motion by the judgment debtors to vacate the judgment by confession and for leave to defend on the ground that the note was executed in blank by them and was filled in by defendant in the instant case in an unauthorized amount; that the judgment debtors were given leave to defend and after a trial the issues were found against plaintiff and the judgment vacated, of which proceedings and trial defendant had notice; that by his indorsement and assignment, defendant warranted and represented that the note was genuine for the full amount shown due by reason whereof defendant became liable to plaintiff for said balance, etc.; (3) contains the same allegations as to the indorsement and assignment, judgment by confession, execution, motion to vacate, trial and judgment, and notice to defendant, and further alleges that by his indorsement and assignment defendant warranted and represented that he had no knowledge of any fact which would impair the validity of the note; that plaintiff, relying on those representations and warranties, accepted the note, whereby defendant became liable to pay the balance due with interest, etc.; (4) differs from the second and third in that it sets forth the assignment. Plaintiff's amended affidavit of claim sets forth that the suit is upon a contract of indorsement and assignment of a certain chattel mortgage and note, by which assignment defendant represented that the note was for a certain, liquidated amount, that the mortgage was genuine as against the maker and guarantors, and that defendant had no knowledge of any facts which would impair their validity; that plaintiff, relying upon the representations and assignment, entered a judgment as alleged in the declaration; that the maker and guarantors set up and maintained a defense on the ground that the note was executed in blank and filled in by defendant for an unauthorized and un-

[illegible]

warranted amount, and by which plaintiff sustained damages in the way of money paid to defendant for the note, interest, etc., and that there is due to plaintiff from defendant, after allowing all just credits, deductions and set-offs, $2,500. To this affidavit was attached a copy of the note and copies of the mortgage and assignment. The admissions and averments of defendant's amended affidavit of merits that apply to the contentions raised by defendant are substantially as follows: Defendant admits that he sold to plaintiff the note and chattel mortgage sued upon and that by virtue of said sale, transfer and assignment he represented to plaintiff that the note was for a certain definite and liquidated amount and that it was genuine as against the maker and guarantors of said note for the balance appearing on its face to be due, and that he had no knowledge of any facts which would impair the validity of the note and chattel mortgage. Defendant denies that plaintiff relied on the warranties and avers that plaintiff made an independent investigation of the signatures on the note and chattel mortgage and relied on his own investigation; avers that he was not apprised of the case being set for trial on December 9, 1927, until about ten days before said date; avers that by reason of the short notice he was not afforded a reasonable opportunity to participate in the proceedings of the trial "and that he, the defendant, did not testify as a witness, although he handled the transaction of the sale of the automobile, and secured the signature of the maker and guarantors, and knows of his own knowledge that the note and chattel mortgage are both genuine as to everything therein contained;" avers that plaintiff did not demand a jury trial in the Municipal Court; avers that on February 1, 1929, he requested plaintiff to proceed with the prosecution of a writ of error to the Appellate Court "of the Municipal Court case or that defendant be permitted the right to test the said decision

warranties exempt, and by which plaintiff sustained damages in the way of money paid to defendant for the note, interest, etc., and that there is due to plaintiff from defendant, after allowing all just credits, deductions and set-offs, $7,500. To this petition was attached a copy of the note and notice of the mortgage and assignment. The defendants and overseers of defendant's assented affidavit of merits that apply to the concentrations raised by defendant are substantially as follows: Defendant admits not be able to plaintiff the note and chattel mortgage sued upon and that by virtue of said note, transfer and assignment be received to plaintiff that the note was for - certain [illegible] liquidated amount and that if the payments on the under mortgaged of said note for the balance remaining on its face to be due, and that he had no knowledge of any facts which would impair the validity of the note and chattel mortgage. Defendant denies that plaintiff [illegible] plaintiff made an independent investigation of the circumstances of the note and chattel mortgage [illegible] aver that he was not [illegible] December 8, 1917, until about the date [illegible] that by reason of the [illegible] opportunity to satisfactorily [illegible] that he, the defendant, [illegible] handled the transaction of the [illegible] the signature of the [illegible] knowledge that the note and chattel mortgage [illegible] to evaluation [illegible] demand a jury trial in the [illegible] 1, 1918. [illegible] a writ of error in the [illegible] or that defendant be [illegible]

in the Appellate Court, but that plaintiff by his attorneys have appeared and objected and that an order was therein entered, reciting that the defendant had made a motion for leave for his attorneys to enter their additional appearance in said case and that upon objection upon behalf of the plaintiff by his attorneys, the said motion was denied."

The Practice Act requires that the affidavit of merits shall specify "the nature of the defense," and the interpretation of the quoted words is thus stated in Harrison v. Rosehill Cemetery Co., 291 Ill. 416, 421-2:

> "The defendant must not only file an affidavit stating that he verily believes he has a good defense to the suit upon the merits to the whole or a portion of the plaintiff's demands, but he must state the kind or character of the defense, and it necessarily must be a legal defense which could be made under his plea."

Defendant contends that one defense set up in the affidavit of merits is that by reason of the short notice given him he was not afforded a reasonable opportunity to participate in the proceedings of the trial had in the Municipal Court. Defendant admits that he was notified "about ten days before said trial was had," and, while he had the right, under the law, to meet the defense interposed by the maker and guarantors of the note, he does not aver that he offered or desired to defend the suit or participate in the trial, or that he informed plaintiff that the defense interposed was untrue, although he avers that he handled the sale of the automobile "and secured the signature of the maker and guarantors," and knew the defense to be untrue; nor does he aver that he requested plaintiff to secure a postponement of the trial, nor does he state that he offered himself as a witness. The affidavit fails to make out a prima facie showing that defendant did not have notice in apt time of the proceedings in question or that he was deprived of an opportunity to meet the defense interposed by the maker and guarantors

in the Appellate Court, but that plaintiff by his attorneys have appeared and objected and that no order was thereon entered, notwithstanding that the defendant had made a motion for leave for his attorneys to enter their additional appearances in said case and that upon objection upon behalf of the plaintiff by his attorneys, the said motion was denied."

The Practice Act requires that the affidavit of merits shall specify "the nature of the defense," and the interpretation of the quoted words is that stated in Kwiatkowski v. Rosehill Cemetery Co., 291 Ill. 416, 421-2:

> "The defendant must not only file an affidavit stating that he verily believes he has a good defense to the suit upon the merits to the whole or a portion of the plaintiff's demand, but he must state the fact [illegible] of the defense, and it necessarily must be a legal defense which would, if made, make his plea."

Defendant contends that the failure not to file the affidavit of merits is that by reason of the court ruling, even his he was not afforded a reasonable opportunity to participate in the proceedings of the trial and in the municipal court. [illegible] he was notified "that the [illegible] was [illegible], and it while in his [illegible] under the law, [illegible] proved by the minor and contradicts [illegible] that he offered or required to [illegible] the suit or participate in the trial, or [illegible] interest [illegible] the defendant [illegible] and [illegible] authorities "and secured the [illegible] and [illegible] that the [illegible] to [illegible] [illegible] that he offered [illegible] out a [illegible] time of the proceedings [illegible] opportunity to [illegible]

of the note. The conduct of defendant in ignoring the trial in the Municipal Court, wherein he was charged with serious misconduct, was not that of an honest or prudent man.

Defendant contends that "another defense in such affidavit of merits is that the defendant was deprived of the opportunity to have said cause tried by a jury, as plaintiff did not demand a jury and when defendant was notified, it was then too late for the defendant to secure a trial by jury. * * * The plaintiff had the right to demand a jury trial when the judgment in question was opened up to allow a defense to be made thereto." Defendant has not cited any authority holding that he was entitled, under the law and the facts of this case, to have the issue submitted to a jury. The submission of the issue to the trial court, instead of a jury, does not show a lack of good judgment nor a want of good faith on the part of plaintiff. If the defense interposed could have been successfully met, defendant is to blame for the failure.

Defendant's last contention is that the affidavit set up a good defense in that it avers "that on February 1, 1929, he had requested of plaintiff that plaintiff proceed with the prosecution of a writ of error to the Appellate Court of the First District of Illinois of the Municipal Court case or that defendant be permitted the right to test the said decision in the Appellate Court, but that plaintiff by his attorneys have appeared and objected." This contention is without the slightest merit.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

of the motor. The conduct of defendant in ignoring the trial in the Municipal Court, wherein he was charged with serious misconduct, was not that of an honest or prudent man.

Defendant contends that "whether defense in such civil-davit of merits in that the defendant was deprived of the opportunity to have said cause tried by a jury, as plaintiff did not demand a jury and when defendant was notified, it was then too late for the defendant to secure a trial by jury. * * * The plaintiff had the right to demand a jury trial when the judgment in question was opened up to allow a defense to be made thereto." Defendant has not cited any authority holding that he was entitled, under the law and the facts of this case, to have the issue submitted to a jury. The submission of the issue to the trial court, instead of a jury, does not show a lack of good faith and merit or a want of good faith on the part of plaintiff. If the defense interposed could have been successfully met, defendant is to blame for the failure.

Defendant's last contention is that the affidavit set up a good defense in that it avers "that on February 1, 1939, he had requested of plaintiff that plaintiff proceed with the prosecution of a writ of error in the Appellate Court of the First District of Illinois of the Municipal Court case of that defendant be permitted the right to test the said judgment in the Appellate Court, but that plaintiff by his attorneys have refused and objected." This contention is without the slightest merit.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Friday, J., concur.

33605

255 I.A. 620

SAMUEL BRIGHT,
Appellant,

v.

SAM LIPAVSKY et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Samuel Bright, plaintiff, obtained a judgment by confession against Sam Lipavsky, Rose Lipavsky and Hyman L. Cohen, defendants, in the sum of $8,492. Thereafter, on motion of defendants, the judgment was vacated. Plaintiff has appealed from this last order. Plaintiff has not filed a bill of exceptions.

Plaintiff contends that the court erred in vacating the judgment by confession. There is nothing before us but the common law record and this does not preserve for our consideration the ruling of the court upon the motion of the defendants to vacate the judgment. The fact that the motion of the defendants was copied into the common law record is not sufficient to save the point.

Plaintiff contends that the court erred in dismissing the suit. The record recites that after the judgment was vacated plaintiff declined to proceed further in the case and thereupon the suit was dismissed; but, in any event, in the absence of a bill of exceptions the action of the court in dismissing the suit must be presumed to be correct.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33605

SAMUEL BRIGHT,
Appellant,

v.

SAM LIZAVERY et al.,
Appellees.

APPEAL FROM JUSTICE COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, Samuel Bright, plaintiff, obtained a judgment by confession against Sam Lizavery, Rose Lizavery and Hyman L. Cohen, defendants, in the sum of $3,452. Thereafter, on motion of defendants, the judgment was vacated. Plaintiff has appealed from this last order. Plaintiff has not filed a bill of exceptions.

Plaintiff contends that the court erred in vacating the judgment by confession. There is nothing before us but the common law record and this does not preserve for our consideration the ruling of the court upon the motion of the defendants to vacate the judgment. The fact that the motion of the defendants was copied into the common law record is not sufficient to give the point.

Plaintiff contends that the court erred in dismissing the suit. The record recites that after the judgment was vacated plaintiff declined to proceed further in the case and thereupon the suit was dismissed; but, in any event, in the absence of a bill of exceptions the action of the court in dismissing the suit cannot be presumed to be correct.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Barton, P. J., and Tridlow, J., concur.

33614

255 I.A. 620

WILLIAM J. SAVAGE,
Appellee,

v.

CLAUDE W. MORRIS and
NICHOLAS M. ELLIS,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of the first class, William J. Savage, plaintiff, sued Claude W. Morris and Nicholas M. Ellis, defendants. The case was tried before the court, without a jury, and there was a finding in favor of plaintiff and his damages were assessed in the sum of $3,907.60. Judgment was entered on the finding and this appeal followed.

The fourth amended statement of claim sets forth a contract in writing, dated April 21, 1916, signed by plaintiff and the two defendants, whereby plaintiff agreed to purchase from the defendants, and the defendants agreed to sell to him a certain lot therein described, for $627, to be paid by plaintiff within a certain time; that plaintiff duly paid the purchase price in full, but that the defendants wrongfully refused to convey the lot to plaintiff and thereafter conveyed the lot to another at an increase in price, and that plaintiff is entitled to damages in the sum of $4,000. The defendants, in their affidavits of merits, admitted the contract but denied that the plaintiff had paid the purchase price in full, and alleged that by reason of plaintiff's default defendants had forfeited the contract, and the Statute of Limitations was also set up as a defense.

The defendants contend that "the entire debt is barred

[illegible]

WILLIAM J. [illegible],
Appellee,

v.

CLAUDIA J. [illegible] and
NICHOLAS R. [illegible],
Appellants.

[illegible]

In the Municipal Court of Chicago, in a action of the first class, William J. [illegible], plaintiff, and Claudia J. [illegible] and Nicholas v. [illegible], defendants. The cause was tried before the court, without a jury, and there was a finding in favor of plaintiff and his damages [illegible] $[illegible]. Judgment was entered on the finding and this appeal follows.

The fourth amended statement of claim was filed [illegible] in writing, under April 21, 1[illegible], signed by plaintiff and the two defendants, whereby plaintiff agreed to purchase from the defendants, the [illegible] for $[illegible]. [illegible] certain specified [illegible] plaintiff fully paid the purchase price [illegible], but that the defendants wrongfully refused to deliver the lot to plaintiff and therefore, [illegible] the lot to another [illegible] in price, and that plaintiff is entitled to damages in the sum of $[illegible]. The defendants, in their [illegible] of [illegible], admitted the existence but denied that the plaintiff has paid the purchase price in full, and alleged that by reason of failure [illegible] breaches the contract, [illegible] set up as a defense.

The defendants contend that [illegible]

by the Statute of Limitations." This contention is based upon the assumption that the suit is not upon a written contract but is based upon a contract partly in writing and partly oral and that therefore the five-year Statute of Limitations applies. The claim of plaintiff is based upon a written contract, and therefore the five-year Statute of Limitations does not apply.

The defendants contend that "the judgment is manifestly contrary to the greater weight of the evidence." After a careful consideration of all the facts and circumstances, we are satisfied that this contention, save as it is urged against the amount of the damages assessed, is without the slightest merit.

The defendants contend that the court erred in its rulings on the admission of testimony. As to this contention it is sufficient to say that on a trial by the court without a jury, this court will not presume that the admission of improper evidence misled the court below, but it will be presumed that the court did not consider any immaterial or improper evidence in reaching a decision, especially where, as in the present case, there is proper evidence to justify the judgment. (See Bigian v. Skach, 247 Ill. App. 644.)

The defendants next contend that an improper measure of damages was used by the court in rendering its finding and judgment; that "on an action for breach of contract claimed by the vendee against the vendor, the measure of damages is the increased fair cash market value of the land over the contract price on the day of the breach (209 Ill. 488, at 496 and at 500), plus the moneys paid," or "on the other hand, treating the contract as rescinded, it is held in O'Brien v. Quirk, 204 Ill. App. 448: 'When the vendor of real estate refuses to make a deed, or comply with his undertaking, the purchaser is entitled to recover whatever money he may have paid.' There are those two courses open to the vendee: rescission, which entitles him to have his money paid back - probably with interest;

by the statute of limitations." This contention is based upon the assumption that the suit is not upon a written contract but is based upon a contract partly in writing and partly oral and that therefore the five-year statute of limitations applies. The bills of plaintiff is based upon a written contract, and therefore the five-year statute of limitations does not apply.

The defendants contend that "the judgment is manifestly contrary to the greater weight of the evidence." After a careful consideration of all the facts and circumstances, we are satisfied that this contention, even as it is urged against the amount of the damages assessed, is without the slightest merit.

The defendants contend that the court erred in the rulings on the admission of testimony. As to this contention it is sufficient to say that on a trial by the court without a jury, this court will not presume that the admission of improper evidence misled the court below, but it will be presumed on a trial that the court did not consider any immaterial or improper evidence in reaching a decision, especially where, as in the present case, there is proper evidence to justify the judgment. (See Tirion v. Hall, 147 Ill. App. 644.)

The defendants next contend that an improper measure of damages was used by the court in rendering its judgment, in that "on an action for breach of contract, it was the vendee against the vendor, not vice versa." [illegible] is the vendee's own monetary value of the land at the time of the breach as the difference between the price on the one hand, plus the money paid, on the other hand, [illegible] the market value of the land. In Tirion v. Hall, 147 Ill. App. 644, [illegible] the rental rights reserved to the vendor - were, or comply with his [illegible] the purchaser is entitled to recover whatever money he may have [illegible]. There was about the contract upon the vendee's [illegible], which entitles him to have his money back - probably with [illegible]

or a suit for damages, which entitles him to an amount to be determined by the value of the property at the time of the breach. He cannot expect to be compensated twice for damages."

The plaintiff made the final payment ($50) on the contract in October, 1918, and a clerk of the defendants promised to mail him a deed for the lot. In November, 1918, plaintiff called for the deed and the defendant Morris stated that there was no record that Savage had paid the $50 and refused to give him the deed. Morris also stated that he had forfeited, or would forfeit, the contract, and the plaintiff then offered "to pay again the $50 balance on the contract," but Morris refused to accept the $50 and subsequently he sent a written notice to the plaintiff in which he stated that he had "decided to exercise the option given me in said contract and herewith declare same forfeited and determined, together with all payments made thereon," and on September 30, 1921, the defendants made a contract to sell the lot in question to one Siegfried.

The following is the manner in which the court assessed the plaintiff's damages:

"The Court finds for the plaintiff and assesses the plaintiff's damages at $3,907.60 in accordance with the contentions of plaintiff, which are as follows:

Date of Payment			Nature of Payment	Amount of Payment	Interest from Date of Pay't @ 5% to & including September 30, 1921.
1916	April	12th	Principal	$ 50.00	$ 13.67
	April	12th	Principal	50.00	13.67
	May	8th	Principal	15.00	4.05
	June	8th	Principal	15.00	3.99
	July	7th	Principal	15.00	3.93
	Aug.	7th	Principal	15.00	3.86
	Sept.	8th	Principal	15.00	3.80
	Oct.	10th	Principal	15.00	3.73
	Nov.	1st	Interest	12.45	3.06
	Nov.	10th	Principal	15.00	3.67
	Dec.	8th	Principal	15.00	3.61
1917	Jan.	31st	Principal	15.00	3.50
	March	26th	Interest	10.75	2.43
	Oct.	12th	Interest	11.75	2.33
1918	Jan.	25th	Principal	42.00	7.73
	Feb.	25th	Principal	40.00	7.20

or a suit for damages, which entitles him to an amount to be determined by the value of the property at the time of the breach. He cannot expect to be compensated twice for damages."

The plaintiff made the final payment ($900) on the contract in October, 1918, and a clerk of the defendants promised to mail him a deed for the lot. In November, 1918, plaintiff called for the deed and the defendant Harris stated that there was no record that George had paid the $50 and refused to give him the deed. Harris also stated that he had forfeited, or would forfeit, the contract, and the plaintiff then offered "to pay again the $50 balance on the contract," but Harris refused to accept the $50 and subsequently he sent a written notice to the plaintiff in which he stated that he had "waived by executing the option given me in said contract and retaining defendants forfeited and cancelled, together with all payments made thereon," and on September 30, 1921, the defendants had a contract to sell the lot in question to one Hagfried.

The following is the manner in which the court measured the plaintiff's damages:

> "The Court finds for the plaintiff and assesses the plaintiff's damages at $3,107.00 in accordance with the contentions of plaintiff, which are as follows:

Date of Payment		Balance of Payment	Amount of Payment	Interest from date of pay't to a judgment rendered July, 1922.
1918 April	12th	principal	$ 50.00	$ 10.07
April	12th	Principal	50.00	10.07
May	8th	principal	10.00	2.02
June	8th	principal	10.00	1.99
July	8th	principal	10.00	1.95
Aug.	7th	principal	10.00	1.88
Sept.	8th	principal	10.00	1.85
Oct.	10th	principal	10.00	1.78
Nov.	1st	interest	10.00	1.74
Nov.	10th	principal	10.00	1.67
Dec.	8th	principal	10.00	1.61
1919 Jan. and	8th	principal	10.00	1.50
March	8th	interest	10.00	1.43
Oct.	10th	interest	11.75	1.66
1919 Jan.	8th	principal	40.00	7.75
Feb.	8th	principal	40.00	7.69

March	11th	Principal	30.00	5.33
March	11th	Interest	2.80	.50
April	5th	Interest	8.68	1.52
April	16th	Taxes	2.72	.48
April	16th	Principal	80.00	13.83
Apr.asof	30th	Dep.for gas mains	165.00	28.18
June	12th	Principal	100.00	16.50
July	1st	Principal	50.00	8.12
Oct.asof	31st	Principal	50.00	7.29
TOTALS----------			$841.15	$165.98

Total amount of cash paid by plaintiff (principal, interest, taxes & deposit for gas mains) ---------- $841.15

Interest thereon at 5% from dates of payments, respectively, to date of breach of contract, to wit: as of September 30th, 1921, the date of sale of lot by defendant Claude W. Morris to Edward O. Siegfried ---------- 165.98

T O T A L (Consideration paid by plaintiff at date of breach) ---------- $1007.13

Amount for which lot was sold to Edward O. Siegfried ---------- $13,850.00

Incumbrances covering improvements thereon as follows:
First Mortgage ---------- $6,750.00
Second Mortgage ---------- 3,500.00 — 10,250.00

Balance (Net amount received by defendant Claude W. Morris on account of sale of lot) ---------- 3,600.00

Deduct "consideration paid by plaintiff at date of breach" (contract price) -- 1,007.13 — 2592.87

Interest on "Total amount of cash paid by plaintiff (principal, interest, taxes & deposit for gas mains)" @ 5% from September 30th, 1921, to and including January 22nd, 1929 ---------- 307.60

TOTAL amount of plaintiff's damages ---------- $3907.60"

The evidence shows that the breach took place in November, 1918, when the defendant Morris refused to give the plaintiff a deed and declared he had forfeited, or would forfeit, the contract, and the measure of damages, upon the theory of a breach of the contract, would be the increased fair cash market value of the land over the contract price at that time, plus the moneys paid; but the plaintiff, in his proof, proceeded upon the theory that the date of the sale to Siegfried was the time of the breach and his evidence as to the increased market value

March	11th	Principal	50.00	8.33
March	11th	Interest	2.50	.50
April	9th	Interest	8.32	1.52
April	16th	Taxes	2.72	.48
April	26th	Principal	50.00	13.63
Apr.-Sept	30th	Dep.for gun mains	165.00	22.18
June	12th	Principal	100.00	16.50
July	1st	Principal	50.00	6.12
Oct.-Sept	31st	Principal	50.00	.83
TOTALS			$1,000.00	$188.75

Total amount of cash paid by plaintiff principal, interest, taxes & deposit for gun mains, ---------- 141.12

Interest thereon at 5% from dates of payments, respectively, to date of breach of contract, to wit: as of September 30th, 1921, the date of sale of lot by defendant Glenda . Morris to Edward C. Hopfried ---------- 188.83

T O T A L (Consideration paid by plaintiff at date of breach) ---------- $1007.12

Amount for which lot was sold to Edward C. Hopfried ---------- $12,250.00

Incumbrances covering improvements thereon as follows:
First Mortgage ---------- $2,500.00
Street Improvements ---------- 10,250.00

Balance (Net amount received by defendant Glenda . Morris on account of sale of lot) ---------- 1,500.00

Deduct "consideration paid by plaintiff at date of breach" (amount above) -- 1,007.12

Interest on "total amount of cash paid by plaintiff (principal, interest, taxes & deposit for gun mains) 5% from expiration of 30th, 1921, to and including date of suit, June ---------- 2.00

TOTAL amount of plaintiff's damage ---------- $490.00

The evidence shows that the breach took place in December, 1921, when the defendant Morris refused to give the plaintiff [illegible] he had forfeited, or would forfeit, [illegible] damages, upon the theory of a breach of the contract, [illegible] increased fair cash market value of the land over the contract price at that time, plus the money paid; the plaintiff in such case [illegible] based upon the theory that the date of [illegible] time of the breach and his evidence [illegible] market value

of the land related to that period of time, and the court, in its findings, adopted this theory, at the request of the plaintiff. We are, therefore, not in a position to adjust the damages upon the basis of the market value of the land in November, 1918. We may add that the plaintiff's method of determining the increased value of the land on September 30, 1921, was an erroneous one.

The evidence, however, clearly shows that the defendants, without justification, refused to comply with their undertaking, and therefore plaintiff is entitled to recover back whatever moneys he may have paid on the contract, plus interest. We find from the evidence that in October, 1918, the plaintiff had paid the defendants, on the contract, in principal and interest, $673.43. From October, 1918, to the date of judgment there was a period of a little over ten years. The interest on $673.43 for ten years at five per cent amounts to $336.70, which, added to $673.43, makes the amount due the plaintiff $1,010.13. Therefore, if plaintiff will within ten days file a remittitur of $2,897.47, the judgment of the Municipal Court will be affirmed for $1,010.13, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

of the land related to that period of time, and the court, in its findings, adopted this theory, as the request of the defendant, is, therefore, not in a position to dispute the 6 mages upon the basis of the market value of the land in September, 1918. [illegible] and that the plaintiff's method of determining the increased value of the land on September 30, 1921, was an erroneous one.

The evidence, however, clearly shows that the defendants, without justification, refused to comply with their covenanting, and therefore plaintiff is entitled to recover back whatever money [illegible] may have paid on the contract, plus interest [illegible] found from the evidence that in October, 1918, the plaintiff [illegible] paid the defendants, on the contract, in principal and interest, $[illegible]. From October, 1918, to the date of judgment there was a period of [illegible] over ten years. The interest on $[illegible] for ten years [illegible] five per cent amounts to $[illegible], which, added to $[illegible], makes the amount due the plaintiff $1,[illegible]. Therefore, if plaintiff will [illegible] the sum of a remittitur of $[illegible], the judgment of the municipal court will be affirmed for $1,[illegible], otherwise the judgment will be reversed and the cause remanded.

[illegible]

Barnes, P. J., and Gridley, J., concur.

255 I.A. 620

33623

HARRY M. STERN, AARON SAX and NATHAN GLICKSBERG,
Appellants,

v.

LOUIS FISHMAN and HERMAN FIDLER,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Harry M. Stern, Aaron Sax and Nathan Glicksberg, sued Louis Fishman, Mayo Friedberg, Herman Fidler and Mitchell Zelins (sometimes spelled Mitchell Zelens) in the Superior Court of Cook County in an action in case. The suit was dismissed as to Friedberg and Zelins. The amended declaration charged fraud and deceit. The defendants Fishman and Fidler filed pleas of the general issue. The case was tried before the court with a jury and at the end of plaintiffs' case the court directed the jury to find the defendants not guilty on the ground that a certain instrument signed by plaintiffs was a release of the defendant Zelins and not a covenant not to sue, and that it therefore operated as a release as to all of the joint tort feasors. Judgment was entered on the verdict and plaintiffs have appealed.

The instrument which the court construed as a release is as follows:

"Know All Men By These Presents that we, Harry M. Stern, Nathan Glicksberg and Aaron Sax of Chicago, Illinois, for and in consideration of the sum of Ten ($10.00) Dollars to us in hand paid and other valuable consideration paid by Mitchell Zelens also designated as Mitchell Zelins of Chicago, Illinois, receipt of which is hereby acknowledged, do for ourselves, our heirs, executors, administrators and assigns agree and covenant with the said Mitchell Zelins, his heirs, executors, administrators and assigns; that we will not at any time or times hereafter

33623

HARRY H. BERNE, AARON BAR
and NATHAN GILDERSMITH,
Appellants,

v.

LOUIS FISHMAN and NORMAN
FULTON,
Appellees.

MR. JUSTICE BERMAN DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Harry H. Berne, Aaron Bar and Nathan Gildersmith, sued Louis Fishman, Joyce Fildeberg, Norman Fulton and Mitchell Nelson, nonresidents (political activists), in the Superior Court of Cook County in an action in trespass. The suit was dismissed on a motion for lack of jurisdiction. The amended declaration charged fraud and deceit. The defendants Fishman and Fulton filed pleas of the general issue. The defendants Nelson and Fildeberg filed with a jury and at the end of plaintiffs' case the court directed the jury to find the defendants not guilty on the ground that a certain instrument signed by plaintiffs was a release of the defendants, claims and not a covenant not to sue, and that it was fore operative as a release as to all of the other defendants. Judgment was entered on the verdict and plaintiffs have appealed.

The instrument which the court considered as a release is as follows:

"Know all men by these presents that we, Harry H. Berne, Nathan Gildersmith and Aaron Bar of Chicago, Illinois, for and in consideration of the sum [illegible] dollars to us in hand paid and other valuable consideration paid by Mitchell Nelson also designated as Mitchell Nelson of Chicago, Illinois, receipt of which is hereby acknowledged, do hereby release, remise, convey, quitclaim and [illegible] unto the said Mitchell Nelson, his heirs, executors, administrators and assigns, all and all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, promises, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which we have had, now have or may have against the said Mitchell Nelson, from the beginning of the world to the day of the date of these presents."

sue, prosecute, molest, attach, trouble or bring any action, cause of action or make any claim or demand upon the said Mitchell Zelins, his heirs, executors, administrators and assigns arising out of a certain cause of action now pending in the Superior Court of Cook County, case No. 440368, entitled Harry M. Stern, et al vs. Louis Fishman, et al and do hereby agree to dismiss out of said suit, the aforesaid Mitchell Zelins.

It is expressly understood and agreed that this instrument shall not be held or be construed to be a release but it should be held and should be construed as a covenant not to sue.

It is further understood and agreed that if this instrument is pleaded in any action brought against the party paying the consideration to this covenant, it shall constitute a good defense to such action.

In Witness Whereof we have hereunto set our hands and seals this 21st day of March, 1927.

Aaron Sax (Seal)
Harry M. Stern (Seal)
Nathan Glicksberg (Seal)

Witness:
John H. Bishop"

The plaintiffs contend that "the instrument given by the plaintiffs to Zelens was a covenant not to sue and not a release and the Court should not have directed a verdict on the ground that the instrument was a release and released all the joint tort feasors." This contention is plainly a meritorious one. (See Nixon v. City of Chicago, 212 Ill. App. 365, 386; Rothschild & Co. v. Griffiths, 214 Ill. App. 29, 33; City of Chicago v. Babcock, 143 Ill. 358, 363; Parmelee v. Lawrence, 44 Ill. 405, 408.) Defendants contend that "whether the instrument is a release or not, is of no particular significance, in view of the fact that we have shown that plaintiffs failed to prove the material allegations of the amended declaration, by reason whereof the Court correctly directed the jury to render its verdict for the defendant." We have carefully considered this contention of the defendants and we find it without merit. Other points raised by the defendants in support of the judgment are also without merit.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

ane, pneumonia, malaria, asthma, trouble or bring any action, cause of action or make any claim or demand upon the said Mitchell Lighting, his heirs, executors, administrators and assigns relating out of a certain cause of action now pending in the superior court of Cook County, case No. 4805[illegible], entitled Harry M. Stern, et al vs. Louis Flamma, et al and do hereby agree to dismiss our of said suit, the [illegible] litigation.

It is expressly understood and agreed that this instrument shall not be held or to construed to be a release but it should be held and should be construed as a covenant not to sue.

It is further understood and agreed that this instrument is binding in any action brought against the party signing the contribution to this covenant. It shall constitute a good defense to such action.

In witness hereof we have hereunto set our hands and seals this 16th day of March, 1927.

Aaron Dam	(Seal)
Harry M. Stern	(Seal)
Hyman Silberberg	(Seal)

Witness:
Isaac H. Simon"

The plaintiffs contend that "the instrument given by the plaintiffs to Aaron was a covenant not to sue [illegible] not a release and the Court should not have directed a verdict on the ground that the instrument was a release and released all the joint tort feasors." This contention is plainly a misinterpretation [illegible] Chicago, 222 Ill. App. 360, 362; [illegible] v. [illegible], 24 Ill. App. 30, 32; [illegible] v. [illegible], [illegible] Ill. 188, 189; [illegible] v. [illegible], [illegible] Ill. [illegible]) [illegible] "whether the instrument is a release or not, [illegible] sufficiency, in view of the fact that [illegible] failed to prove the material allegations of the [illegible] by a mere showing the court correctly directed the jury to return a verdict for the defendant." [illegible] examination of the documents and [illegible] it without [illegible] raised by the defendants in support of the judgment [illegible] merit.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

Reversed and remanded.

Barnes, P. J., and Gridley, J., concur.

33636

255 I.A. 620

OTTO B. LAWRENZ,
Appellee,

v.

WALLER E. LOEBER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Otto B. Lawrenz sued Waller E. Loeber, in the Superior Court of Cook County, in an action in trover. The case was tried before the court, with a jury, and a verdict was returned in favor of plaintiff in the sum of $3,400. He remitted the sum of $107.31 and judgment was entered for $3,292.69. Defendant has appealed.

On March 8, 1926, plaintiff borrowed from defendant $1,000 and gave to defendant his promissory note in a like amount, payable in ninety days, and twenty-five shares of Swift & Company stock as collateral security. The note contained the following:

> "Having deposited with said payee, as collateral security for the payment of this or any other liabilities of the undersigned, or either or any of them, to the legal holder hereof, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said legal holder, the following property:
> Certf #C.O. 249817 - 25 Shares Swift & Co.
> said property being hereby by the undersigned valued at $2875. Said collaterals, or any part thereof, and the proceeds of the sale thereof, or any part thereof, shall be applicable to any other note or claim whether due or not, held by said payee or his assigns, against the undersigned, or any or either of them; and the said holder or its assigns shall have the same rights and powers to hold, sell or dispose of said collaterals, or any part thereof, in respect of and as security for said other note or claim, as are herein granted with reference to this note."

The note was not paid when it became due. In August, 1926, plaintiff arranged to purchase an automobile from the Marquardt Motor Sales Company and about the same time requested defendant to make him a

OTTO B. LAWRENCE, Appellee,	
v.	AD. NO. 35516
RALPH E. LORENZ, Appellant.	COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT:

Otto B. Lawrence sued Walter E. Loehr, in the Superior Court of Cook County, in an action in trover. The case was tried before the court, with a jury, and a verdict was returned in favor of plaintiff in the sum of $1,400. He remitted the sum of $107.71 and judgment was entered for $1,292.29. Defendant has appealed.

On March 8, 1942, plaintiff borrowed from defendant $1,000 and gave to defendant his promissory note in a like amount, payable in ninety days, and twenty-five shares of stock of a company stock as collateral security. The note contained the following:

> "Having deposited with said payee, as collateral security for the payment of this or any other liabilities of the undersigned, or either or any of them, to the legal holder hereof, due or to become due, or that may be hereafter contracted or existing, the following described property, the following property:
>
> Serial No. 8[illegible] - 25 shares, [illegible] & Co.
>
> said property being hereby by the undersigned valued at $2[illegible]. Said collateral, or any part thereof, and the proceeds of the said thereof, or any part thereof, shall be applicable to any other note or claim whether due or not, held by said payee or his assigns, against the undersigned, or any or either of them; and the said holder or its assigns shall have the same rights and powers to sold, sell or dispose of said collateral, or any part thereof, in respect of one or more or any of said other note or claim, as are herein granted with reference to this note."

The note was not paid when it came due. In March, 1944, plaintiff arranged to purchase an automobile from the management Motor Sales Company and about the same time requested defendant to sell him a

further loan of $1,000, which he said he needed to make the "down payment" on the car. For some time prior to this request defendant had been engaged in selling to certain individuals prospective memberships in a proposed corporation to be known as the Castle Garden Golf & Country Club, and plaintiff was also interested in the scheme. There was an account in a certain bank known as the Castle Garden Golf & Country Club account and at the time of the request there was approximately $1,100 in it, all of which had been obtained by defendant from the sale of memberships to prospective members. Plaintiff admitted that this bank account "consisted of money derived from memberships which Mr. Loeber sold in the Castle Garden Golf & Country Club." Defendant testified that at the time of the request the following (inter alia) occurred: "I (defendant) said, 'I tell you what I will do. If there is any reason why this golf course is not completed and I am required to return the money to these people, I will loan this $1,000 out of there if it is agreed that this be held against the Swift & Company stock as additional collateral.' And he said, 'Yes.' * * * I said, 'If there is any reason why this golf course don't go through I must return this money to the people who made the deposit on anticipation of membership in this club.'" On September 15, 1926, defendant drew a check on the Castle Garden Golf & Country Club account for $1,000, payable to the order of plaintiff. The check was signed: "Castle Garden Golf & Country Club By W. E. Loeber Sec'y and Treas." On the reverse side are the signatures of the defendant and Marquardt Motor Company. The check was paid November 1, 1926, and it is clear from the testimony of both parties that this $1,000 was used in the purchase of an automobile for plaintiff from the Marquardt Motor Company. At the time the automobile was purchased defendant also advanced to plaintiff $63. Thereafter

further loan of $1,000, which he said he would be making to make the "down payment" on the car. Her name also prior to this payment defendant had been engaged in selling to earth in Antigonish prospective membership in a proposed corporation to be known as the Castle Garden Golf & Country Club, and plaintiff was also interested in the scheme. There was an account in a credit-in bank known as the Castle Garden Golf & Country Club account and at the time of the payment there was approximately $1,100 in it, all of which had been obtained by defendant from the sale of memberships to prospective members. Plaintiff admitted that this bank account contained of money derived from membership sales. Another sale in the Castle Garden Golf & Country Club. Defendant's evidence was at the time of the payment the following: "Mr. Lawson said "I (defendant) said, 'I will see what I can do.' If there is any reason why this will cause me any [illegible] I am required to return the money to these people. Will [illegible] $1,000 out of there if it is proved that a mistake has been made in making a company about an additional collection." And he said, 'Yes.' I said, 'If there is any reason why this will cause [illegible] so through I must return this money to the people who made the payments on membership of membership in this club." On October 1st, 1956, defendant drew a check on the Castle Garden Golf & Country Club account for $1,000, payable to the order of plaintiff. The check was signed "Castle Garden Golf & Country Club, [illegible] Geo'y and Treas." On the reverse side [illegible] defendant and Lawrence Motor Company. The check was [illegible] on October 1, 1956, and it is clear from the testimony of both parties that this $1,000 was used in the purchase of an automobile or partially from the Lawrence Motor Company. At the time the [illegible] purchased defendant also assented to plaintiff's [illegible]. Thereafter

a misunderstanding arose between plaintiff and defendant and the club was never incorporated and the plan to organize the same was abandoned. Defendant testified that he then paid back to the prospective members the $1,100 which they had paid "in anticipation of their memberships," but this testimony, on motion of the plaintiff, was stricken out by the trial court on the ground that it was immaterial. Thereafter plaintiff tendered to defendant the sum of $1,055 in full payment of the note of March 8, 1926, and demanded the return of the stock held as collateral, but the tender was refused on the ground that there was due defendant in addition to the $1,055 the sum of $1,063 that was paid by defendant towards the purchase of the automobile and that the collateral security, under the terms of the note of March 8, 1926, covered this last amount.

Defendant contends (inter alia) that the verdict is against the weight of the evidence, and we have reached the conclusion that this contention is a meritorious one. As the case will probably be tried again we refrain from further analyzing and commenting on the evidence of the respective parties. We deem it necessary, however, to refer to one important question involved in the present contention. The theory upon which plaintiff succeeded in the lower court, and upon which he stands in this court, is that the Golf & Country Club was a partnership venture of plaintiff and defendant and that the bank account of the Castle Garden Golf & Country Club was an account of this partnership, and that therefore defendant cannot set up in the present suit - an action at law - the claim for the $1,000 that is based on the check of September 15, 1926; that to permit him to do so would be to allow an accounting of the partnership dealings between the parties in an action at law. As to this contention it is sufficient to say that the evidence clearly establishes that the Golf & Country Club bank account represented, in its entirety, a trust fund - not a

a misunderstanding arose between plaintiff and defendant and the club was never incorporated and the plan to organize the game was abandoned. Defendant testifies that he then paid back to the prospective members the $1,[illegible] that they had paid "in anticipation of their membership," but this testimony, on motion of the plaintiff, was stricken out by the trial court on the ground that it was immaterial. Nevertheless, plaintiff brought to defendant the sum of $1,000 in full payment of the note of March 6, 1926, and demanded the return of the note held as collateral, but the latter was returned on the ground that there was defendants in addition to the $1,000 the sum of $[illegible] to be paid by defendant towards the purchase of the automobile and the collateral security, under the terms of the note of March 6, 1926, covered this last amount.

Defendant contends that after the verdict in against the weight of the evidence, and he has raised the constitution that this constitution is a mandatory one. In the case will probably be tried again we refrain from further comment on the evidence of the respective parties. It seems it necessary, however, to refer to one important question involved in the present controversy. The theory upon which plaintiff proceeded in the lower court, and upon which he stands in this court, is that the Coil & Country Club was a partnership composed of [illegible] defendant and that the bank account of the Coil & Country Club was a [illegible] of this partnership, and that therefore plaintiff cannot set up in the present suit a [illegible] claim for $1,000 that he based on the check of [illegible] 16, 1926 [illegible] so would be to allow an accounting of the [illegible] between the parties in an action at law. In this connection it is sufficient to say that the evidence clearly establishes [illegible] Coil & Country Club came account represented, in its entirety, a trust fund [illegible]

partnership fund - and neither plaintiff nor defendant had any right to use the same as they did, but as between the parties to this suit, and under the facts of this case, defendant might sue plaintiff for the $1,000 transaction of September 15, in assumpsit, under a count for money had and received, upon the theory that plaintiff received money which in equity and good conscience he should pay to defendant. There is, therefore, no merit in the contention of plaintiff that defendant had no right to set up as a defense to the suit, the transaction of September 15;

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

particularly fund - and neither plaintiff nor defendant had any right to use the same as they did, but as between the parties to this suit, and under the facts of this case, defendant might use plaintiff for the $1,000 transaction of September 15, in accounts, under a count for money has and received, upon the theory that plaintiff received money which in equity and good conscience he should pay to defendant. There is, therefore, no merit in the contention of plaintiff that defendant had no right to set up as a defense in the suit, the transaction of September 15.

The judgment of the superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Dunlap, J., concur.

33648

255 I.A. 621

MAY CUMMINGS,
Appellee,

v.

MAGGIE C. WINDHAM,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of forcible entry and detainer, May Cummings, plaintiff, sued Maggie C. Windham, defendant. The case was tried before the court, with a jury, and a verdict was returned in favor of the plaintiff. Neither the defendant nor her counsel was present in court during the trial. On February 14, 1929, judgment was entered on the verdict. On February 19, 1929, the defendant moved to have the judgment vacated and filed two affidavits in support of the same, and on February 21, 1929, the motion to vacate was overruled. The defendant has appealed from this last order.

The defendant contends that "the denial of motion to vacate judgment was an abuse of discretion on the part of the court, prejudicially against defendant."

The defendant in the present suit was personally served, her appearance was entered, and she demanded a jury trial, and under such a state of the record it is the settled law of this state that a motion to set aside a judgment is addressed to the sound judicial discretion of the court, and its action will not be reviewed except for abuse. The moving party must show both diligence and a meritorious defense. It is unnecessary to cite

ERROR

MAY GOMMINGER,
Appellant,

v.

MAGGIE C. HADDEN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCHALLER DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of forcible entry and detainer, May Gomminger, plaintiff, sued Maggie C. Hadden, defendant. The case was tried before the court, with a jury, and a verdict was returned in favor of the plaintiff. Neither the defendant nor her counsel was present in court during the trial. On February 14, 1923, judgment was entered on the verdict. On February 19, 1923, the defendant moved to have the judgment vacated and filed her affidavits in support of the motion, and on March 27, 1923, the motion to vacate was overruled. The defendant has appealed from this last order.

The defendant contends that a trial of motions to vacate judgment are in effect a direct attack on the part of the court, practically speaking, "of no moment."

The defendant in the [illegible] was personally served, her appearance was entered, and she demanded a jury trial, and under such a state of the record it is the settled law of this state that a motion to set aside a judgment is addressed to the sound judicial discretion of the court, and its action will not be reviewed except for abuse. The moving party must show diligence and a meritorious defense. It is unnecessary to cite

authorities in support of this rule. It is also the law that want of diligence on the part of the attorney binds the client. (Eggleston v. Royal Trust Co., 205 Ill. 170, 177.) It appears from the affidavits that on Saturday, February 9, 1929, the defendant and her attorney, Mr. Ferguson, appeared before one of the judges of the Municipal Court and demanded a jury trial, and that thereupon the case was transferred to Judge Rooney, one of the judges of that court. The parties to the suit and their attorneys then repaired to the courtroom of Judge Rooney and there the attorney for the defendant stated to the court that he would be in Springfield on Monday, on a motion before the Supreme Court, and that he would not be back in Chicago before Tuesday or Wednesday morning, and thereupon the case was set for trial for Thursday morning, February 14, at 9:30 a. m. On that date, when the case was reached for trial on the call, neither the defendant nor her attorney appeared, and a jury was sworn to try the issues, and after the plaintiff had introduced her evidence the court directed a verdict in her favor. Mr. Ferguson, in his affidavit, states that "while the jury was signing their verdict, one Martin appeared and told the Court that affiant was before the Supreme Court." This statement of the attorney is, of course, based on hearsay. There is nothing in the affidavits to show who Martin was, or that he had any right or authority to represent the defendant before Judge Rooney. So far as the affidavits disclose, the first time, after the cause was set for trial, that anybody representing the defendant appeared before Judge Rooney, was on February 19, 1929, when the motion to vacate was made by her attorney. Counsel for the defendant made his motion before the Supreme Court on February 15, and the motion was then taken under consideration. We have carefully considered the affidavit of Mr. Ferguson, and in our

authorities in support of this rule. It is also the law that want of diligence on the part of the attorney binds the client. (Bailey v. Royal Exch. Co., 208 Ill. 170, 177.) It appears from the affidavits that on Saturday, February 9, 1929, the defendant and her attorney, Mr. Ferguson, appeared before one of the judges of the Municipal Court and demanded a jury trial, and that thereupon the case was transferred to Judge Mooney, one of the judges of that court. The parties to the suit and their attorneys then repaired to the courtroom of Judge Mooney and there the attorney for the defendant stated to the court that he would be in Springfield on Monday, on a motion before the Supreme Court, and that he would not be back in Chicago before Tuesday or Wednesday morning, and thereupon the case was set for trial for Thursday morning, February 14, at 9:30 a. m. On that date, when the case was reached for trial on the call, neither the defendant nor her attorney appeared, and a jury was sworn to try the issues, and after the plaintiff had introduced her evidence the court directed a verdict in her favor. Mr. Ferguson, in his affidavit, states that "while the jury was rendering their verdict, one Martin appeared and told the Court that affiant was before the Supreme Court." This statement of the attorney is, of course, based on hearsay. There is nothing in the affidavits to show who Martin was, or that he had any right or authority to represent the defendant before Judge Mooney. So far as the affidavits disclose, the first time, after the cause was set for trial, that anybody representing the defendant appeared before Judge Mooney, was on February 14, 1929, when the motion to vacate was made by her attorney. Counsel for the defendant made his motion before the Supreme Court on February 13, and the motion was then taken under consideration. We have carefully considered the affidavit of Mr. Ferguson, and in our

judgment it fails to affirmatively show that he was not in Chicago on February 14, at the time the case was called for trial, and, certainly, it makes no showing as to why he did not have someone represent him at that time, if he was not able to be present. The defendant was present before Judge Rooney on February 9, when the case was set for trial, and she did not appear in court on February 14. In the reply brief filed by the defendant, her counsel has attempted to interject into the case alleged facts not shown by the record, but it is hardly necessary to state that we cannot consider these. So far as the record discloses, the first time either the defendant or her counsel appeared before Judge Rooney after the case was set for trial, was five days after the entry of judgment.

We are satisfied, after a careful consideration of the affidavits, that the defense the defendant seeks to interpose to the present suit is an equitable one at most, and forcible detainer is an action at law, and an equitable defense cannot be set up to such an action. (O'Brien v. O'Brien, 195 Ill. App. 346. Other cases to the same effect might be cited.) If the facts upon which the defendant relies were sufficient to warrant a decree in her favor she should have resorted to a court of equity and applied for an injunction to restrain the further prosecution of the present suit until the suit in equity could be heard and determined. (See Grubbs v. Boon, 201 Ill. 98, 104.) It does appear from the affidavits that sometime prior to the present suit the plaintiff sued the husband of the defendant for possession of the premises in question and that the defendant appeared and defended the suit, and that a judgment was entered in favor of the plaintiff from which the defendant prayed an appeal, but that the appeal was never perfected; that thereafter she filed a bill in the Circuit Court of Cook County and moved the

judgment it fails to affirmatively show that he was not in Chicago on February 14, at the time the case was called for trial, and, certainly, it makes no showing as to why he did not have someone represent him at that time, if he was not able to be present. The defendant was present before Judge Rooney on February 9, when the case was set for trial, and she did not appear in court on February 14. In the reply brief filed by the defendant, her counsel has attempted to interject into the case alleged facts not shown by the record, but it is hardly necessary to state that we cannot consider these. So far as the record discloses, the first time either the defendant or her counsel appeared before Judge Rooney after the case was set for trial, was five days after the entry of judgment.

We are satisfied, after a careful consideration of the affidavits, that the defense the defendant seeks to interpose to the present suit is an equitable one at most, and forcible detainer is an action at law, and an equitable defense cannot be set up to such an action. (Gilman v. O'Hagan, 193 Ill. App. 346. Other cases to the same effect might be cited.) If the facts upon which the defendant relies were sufficient to warrant a decree in her favor she should have resorted to a court of equity and applied for an injunction to restrain the further prosecution of the present suit until the suit in equity could be heard and determined. (See Stubbs v. Moore, 201 Ill. 88, 104.) It does appear from the affidavits that sometime prior to the present suit the plaintiff sued the husband of the defendant for possession of the premises in question and that the defendant appeared and defended the suit, and that a judgment was entered in favor of the plaintiff from which the defendant prayed an appeal, but that the appeal was never perfected; that thereafter she filed a bill in the Circuit Court of Cook County and moved the

chancellor for an injunction to restrain the enforcement of the judgment for possession against her husband, and that after a hearing the motion was denied.

After a careful consideration of the present appeal, we are satisfied that the trial court did not abuse its discretion in denying the motion of the defendant to vacate the instant judgment, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

elementary for an injunction to restrain the enforcement of the judgment for possession against her husband, and that after a hearing the motion was denied.

After a careful consideration of the present appeal, we are satisfied that the trial court did not abuse its discretion in denying the motion of the defendant to vacate the default judgment, and the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33648

255 I.A. 621

EDMUND P. TUOHY, JOHN F. POWER and JOSEPH A. McINERNEY, Jr., Executors of the Estate of Joseph A. McInerney, Deceased, and JOHN F. POWER, Individually, Who Formerly Did Business with the late Joseph A. McInerney as McInerney & Power,
Defendants in Error,

v.

HENRY ULRICH,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Edmund P. Tuohy sued Henry Ullrich in the Circuit Court of Cook County in an action on the case for libel. In February, 1928, a judgment was entered against Ullrich for the sum of $3,000. He prayed an appeal to the Appellate Court, but the appeal was never perfected. On March 12, 1928, McInerney & Power, attorneys for Tuohy in the libel suit, filed in the office of the clerk of the Circuit Court of Cook County a notice of attorneys' lien. This notice contained (inter alia) the following: that Tuohy "has agreed to pay us for our services as a fee one hundred dollars and a sum equal to one-half of whatever amount may be recovered therefrom by suit, settlement or otherwise, and that we claim a lien upon said claim, demand or cause of action for such fee." On March 23, 1928, Tuohy filed with the said clerk a satisfaction of judgment in which he acknowledged "full satisfaction of the above judgment this 3rd day of March, A. D. 1928, the said judgment and costs having been paid." On July 14 McInerney & Power filed their sworn petition setting forth a contract for legal fees between Tuohy and the petitioners and averring that they had served on Ullrich, on March

[illegible]

[illegible] TUOHY, JOHN V. ROSE
and JOSEPH A. McCONNEY, Jr.,
Executors of the Estate of
Joseph A. McInerney, Deceased,
and JOHN F. DUFF, Individually,
who formerly had business with
the late Joseph A. McInerney as
McInerney & Duff,
Defendants in Error,

v.

HENRY WERNICK,
Plaintiff in Error.

MR. JUSTICE CARTER delivered the opinion of the court:

Henry Wernick and Henry Wilcox in the Circuit Court of Cook County in an action on the case for libel. In February, 1928, a judgment was entered against Wilcox for the sum of $[illegible]. He prayed an appeal to the Appellate Court, but the appeal was never perfected. On March 1[illegible], 1928, McInerney & Duff, attorneys for Tuohy in the libel suit, filed in the office of the clerk of the Circuit Court of Cook County a notice of attorney's lien. This notice contained [illegible] following: "[illegible] agreed to pay us for our services a fee [illegible] one-[illegible] equal to [illegible] of whatever amount [illegible] by litigation or suit, settlement or compromise, [illegible] claim [illegible] upon said claim, [illegible] for each [illegible]." On [illegible] 23, 1928, [illegible] filed with the said clerk a [illegible] in which he admitted "that satisfaction of the [illegible] this 3rd day of March, [illegible] been paid." On July 1[illegible] McInerney [illegible] filed their [illegible] petitioners and averring that they had served on Wilcox, in [illegible]

12, 1928, a notice of attorneys' lien and that they had filed the notice with the said clerk. The petitioners prayed the court "to adjudicate their right in the premises and that this Honorable Court enter judgment for the amount which may be shown to be due your petitioners." On October 16, 1928, the cause was heard and an order was then entered, containing (inter alia) the following:

> "And it appearing to the Court that a judgment was entered in the above entitled cause on the 4th day of February, A. D. 1928, for the sum of Three Thousand Dollars ($3000.00); that said petitioner Joseph A. McInerney and John F. Power, doing business as McInerney & Power, have a lien on said judgment by reason of the contract entered into with the said Edmund P. Tuohy, that on to-wit: the 12th day of March, 1928, a notice of said lien was filed in the office of the Clerk of this Court and that a copy of said notice was duly served upon the defendant, Henry Ullrich, on the 13th day of March, 1928;
>
> And it further appearing to the Court that the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, have fully complied with the statute in such case made and provided, and the Court further finds the issues for the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, and against the defendant Henry Ullrich, and assesses Joseph A. McInerney and John F. Power, doing business as McInerney & Power, damages at the sum of Fifteen Hundred Dollars ($1500.00).
>
> It is therefore ordered, adjudged and decreed that the said Joseph A. McInerney and John F. Power, doing business as McInerney & Power, shall have and recover of the said Henry Ullrich the sum of Fifteen Hundred Dollars ($1500.00) and judgment as hereby entered therefor."

Ullrich prayed an appeal from the order and filed an appeal bond in the sum of $3,000 but he failed to file a transcript of the record in this court in due time and his appeal was dismissed. He now seeks to have the judgment of the Circuit Court reviewed by writ of error. No bill of exceptions has been filed in this court.

Plaintiff in error contends that the transcript of the record filed in this court contains no placita for the October term, 1928, when the instant judgment was entered. It is true that the transcript of the record filed by him contained only a placita for the March term, 1926, but the defendants in error, by leave of court, have filed a supplemental record containing a placita for the October term, 1928. One placita, that for the term at which judgment is entered, is

It, 1928, a notice of appeal was that they had filed the notice with the said clerk. The petitioners prayed the court "to adjudicate their right in the premises and that this honorable court enter judgment for the amount which may be shown to be due your petitioners." On October 14, 1928, the cause was heard and an order was then entered, containing (inter alia) the following:

"and it appearing to the court that a judgment was entered in the above entitled cause on the 4th day of December, . . 1928, for the sum of three thousand dollars (3,000.00), that said petitioner Joseph . Kolmenty and John F. Power, doing business as Kolmenty & Power, have a lien on said judgment by reason of the contract entered into with the said defendant F. Hardy, that on the 4th day of March, 1929, a notice of said lien was filed in the office of the Clerk of this court and that a copy of said notice was duly served upon the defendant, Henry Ulrich, on the 15th day of March, 1929; and it further appearing to the court that the said Joseph A. Kolmenty and John F. Power, doing business as Kolmenty & Power, have fully complied with the statute in such case made and provided, and the court further finds the issues for the said Joseph A. Kolmenty and John F. Power, doing business as Kolmenty & Power, and against the said Henry Ulrich, and announces Joseph A. Kolmenty and John F. Power, doing business as Kolmenty & Power, to be the owners of a three thousand dollar judgment in this court."

It is therefore ordered, adjudged and decreed that said Joseph A. Kolmenty and John F. Power, doing business as Kolmenty & Power, shall have and recover of and from said Ulrich the sum of fifteen hundred dollars (1500.00) and judgment is hereby entered therefor."

Ulrich prayed an appeal from the order, and filed an appeal bond in the sum of $3,000.00 but he failed to file a transcript of the record in this court in the time and manner required by statute. He now seeks to have the judgment of the trial court reversed by writ of error. He bill of exceptions has been filed in this court.

Liability in error contains a transcript of the record filed in this court contains no finding for the defendant, Ulrich, when the instant judgment was entered. It is true that the transcript of the record filed by him does that only a plaintiff in error, in 1928, but the defendant in error, by leave of court, has filed a supplemental record containing a petition for the [illegible] 1928. The pleadings, that for the term in which judgment in question, is

sufficient to show the legal organization of the court which has heard and determined a case sought to be reviewed. (Leafgreen v. Leafgreen, 127 Ill. App. 184; Paul v. Weber, 223 Ill. App. 257; City of Alton v. Heidrick, 248 Ill. 76, 79.)

The plaintiff in error contends that "the record in the case at bar shows no notice whatever served upon the defendant; neither does the finding of the Court in its final order and judgment recite that the defendant has any actual notice of such proceeding," and therefore the judgment rendered against him cannot be sustained. The statute provides that "on petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in term time or vacation." That the plaintiff in error had actual knowledge of the proceedings is apparent from the fact that he prayed an appeal from the judgment and filed his bond. If the plaintiff in error had occasion to complain that he had not been served with the statutory notice of the hearing, that fact should have been made to appear by a bill of exceptions. Moreover, we may also presume from the finding in the judgment order that the defendants in error "have fully complied with the statute in such case made and provided," that there was proof of proper notice, especially in the absence of a bill of exceptions.

The plaintiff in error contends that Tuohy and he had the right to adjust the judgment at any time and that the attorneys' lien attached only to what was actually paid by the plaintiff in error to Tuohy and that as the petition contains no allegation as to the actual amount of the settlement and as the court in its order makes no finding in that regard the judgment against the plaintiff in error for one-half of the amount of the judgment rendered against him in the libel suit was erroneous. The court, in the judgment order, assessed the

sufficient to show the legal correctness of the court which has heard and determined a case sought to be reviewed. (Lewkowicz v. Lewkowicz, 157 Ill. App. 186; Ferri v. Cooper, 243 Ill. App. 287; Order of Alsen v. Holdrich, 260 Ill. 70.)

The plaintiff in error contends that "the record in the case as her shows no notice whatever served upon the defendant; neither does the finding of the Court in its final order and judgment recite that the defendant has any actual notice of such proceeding," and therefore the judgment rendered against him cannot be sustained. The statute provides that "on petition filed by such attorney or their clients any court of competent jurisdiction shall, on not less than five days' notice to the adverse party, adjudicate the rights of the parties and enforce such lien in some time or vacation." Thus the plaintiff in error has actual knowledge of the proceedings in abstract from the fact that he secured an appeal from the judgment and filed his bond. If the plaintiff in error had occasion to complain that he has not been served with the statutory notice of the hearing, that fact should have been made to appear by a bill of exceptions. Moreover, we may also presume from the finding in the judgment order that the defendant in error "has fully complied with the statute in such case made and provided," that there was proof of proper notice, especially in the absence of a bill of exceptions.

The plaintiff in error contends that "only and be and the right to adjust the judgment at any time and that the attorneys' lien attached only to what was actually paid by the plaintiff in error to Cooper and that as the petition contains no allegation as to the amount of the settlement and as the court in its order makes no finding in that regard the judgment against the plaintiff in error for one-half of the amount of the judgment rendered against him in the lower suit was erroneous. The court, in the judgment order, assessed the

damages of the defendants in error at the sum of $1,500, and in the absence of a bill of exceptions it will be presumed that the finding of the court was warranted from the evidence.

The plaintiff in error contends that the satisfaction of judgment filed by Tuohy purports to have been executed on March 3, 1928, and that as the plaintiff in error was not served with a notice of the claim for attorneys' lien until March 12, 1928, no claim for lien could arise against the plaintiff in error. The satisfaction of judgment was not filed until March 23, 1928, and we must presume, in the absence of a bill of exceptions, that the proof warranted the court in finding that the judgment in the libel case was not satisfied until after notice of attorneys' lien had been served on the plaintiff in error.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

damages of the defendants in error at the sum of $1,000, and in the absence of a bill of exceptions it will be presumed that the finding of the court was warranted from the evidence.

The plaintiff in error contends that the satisfaction of judgment filed by Tuohy purports to have been executed on March 3, 1922, and that as the plaintiff in error was not served with a notice of the claim for attorneys' lien until March 13, 1922, no claim for lien could arise against the plaintiff in error. The satisfaction of judgment was not filed until March 23, 1922, and we must presume, in the absence of a bill of exceptions, that the proof warranted the court in finding that the judgment in the libel case was not satisfied until after notice of attorneys' lien had been served on the plaintiff in error.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

33670

255 I.A. 62

THOMAS J. COONEY,
Defendant in Error,

v.

G. H. SCHOLZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas J. Cooney, plaintiff, sued G. H. Scholz, defendant in the Municipal Court of Chicago, in an action of contract. The case was tried before the court, without a jury, and there was a finding in favor of the plaintiff and his damages were assessed at the sum of $530. Judgment was entered on the finding and the defendant has sued out this writ of error. The plaintiff has not filed a brief in this court.

The plaintiff is an undertaker and embalmer and sued to recover for goods furnished and services rendered in the burial of the defendant's wife. The affidavit of merits avers that the plaintiff does not know that the defendant furnished the goods and rendered the services claimed, and that if the plaintiff did furnish the same he did not do so at the request of the defendant; that the defendant never employed the plaintiff and that no demand was ever made upon the defendant for the payment of the plaintiff's bill and that the defendant does not know whether or not $643.40 is a fair and reasonable charge for the goods and services alleged to have been rendered.

One of the witnesses testified that the plaintiff had been appointed administrator of the estate of the deceased wife and that he had filed his application for appointment upon the ground that he was a creditor of the said deceased and had not been paid

33970

THOMAS J. CONWAY,
Defendant in Error,

v.

G. H. SCHOLE,
Plaintiff in Error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Thomas J. Conway, plaintiff, sued G. H. Scholé, defendant, in the municipal court of Chicago, in an action of replevin. The case was tried before the court, without a jury, and there was a finding in favor of the plaintiff and his damages were assessed at the sum of $250. Judgment was entered on the finding and the defendant has sued out this writ of error. The plaintiff has not filed a brief in this court.

The plaintiff is an undertaker and embalmer who used to receive the goods furnished and services rendered in the burial of the defendant's wife. The affidavit of merits avers that the plaintiff never has been paid for the services claimed, and that if the plaintiff did furnish the same he did not do so at the request of the defendant; that the defendants never employed the plaintiff; and that the bills were made upon the defendants for the payment of the plaintiff's bill and that the defendants have not ever whether or not failing is a fair and reasonable charge for the goods and services alleged to have been rendered.

One of the witnesses testified that the plaintiff had been appointed administrator of the estate of the deceased and that he had filed his application for appointment in the probate court; that he was a creditor of the said deceased and had not been paid

his bill. The same witness also testified that the deceased left no money or estate. Whether, or not, the plaintiff filed a claim against the estate does not appear. The defendant, citing the above facts, contends that the plaintiff cannot assert his claim against the defendant "until he has shown that he has exhausted the estate." As stated in Weinstein v. Lotzoff, 232 Ill. App. 566, 569, at common law a husband is under a legal obligation to bury his deceased wife. The same case holds that the husband, not the estate of the wife, is primarily liable for the expenses of the wife's funeral. There is no merit in the instant contention.

The defendant contends that the plaintiff failed to make any proof as to the items of the plaintiff's claim and the reasonableness of the charges. This contention is a meritorious one. It is clear, however, that the plaintiff has a just claim against the defendant and should have another opportunity to properly prove his case.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

his bill. The same witness also testified that the deceased left no money or estate. Whether, or not, the plaintiff filed a claim against the estate does not appear. The defendant, citing the above facts, contends that the plaintiff cannot assert his claim against the defendant "until he has shown that he has exhausted the estate." As stated in Leinstein v. Jarrett, 252 Ill. App. 326, 328, at common law a husband is under a legal obligation to bury his deceased wife. The case cons holds that the husband, not the estate of the wife, is primarily liable for the expenses of the wife's funeral. There is no merit in the instant contention.

The defendant contends that the plaintiff failed to make any proof as to the items of the plaintiff's claim and the reasonableness of the charges. This contention is a meritorious one. It is clear, however, that the plaintiff has a just claim against the defendant and should have another opportunity to properly prove his case.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Griffin, J., concur.

33685

255 I.A. 621

CHICAGO TITLE AND TRUST COMPANY,
as Trustee,
Appellee,

v.

CELLE BECKER et al.,
Defendants.

CELLE BECKER,
Appellant.

INTERLOCUTORY APPEAL FROM AN INTERLOCUTORY ORDER APPOINTING THE FOREMAN TRUST & SAVINGS BANK RECEIVER, ENTERED IN THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by Celle Becker to have reviewed an interlocutory order of the Circuit Court of Cook County appointing Foreman Trust & Savings Bank receiver for the apartment building located at the northwest corner of Kenmore & Hollywood avenues, Chicago. The order was entered upon the amended and supplemental bill of complaint filed by the Chicago Title & Trust Company, trustee, to foreclose a certain trust deed given by Celle Becker about June 29, 1927, to secure the principal sum of $250,000 and interest.

On February 11, 1929, R. I. Davis and the Chicago Title & Trust Company, trustee, filed their bill of complaint to foreclose the above mentioned trust deed on the property aforesaid. On February 14, 1929, Judge Brothers, one of the chancellors of the Circuit Court, appointed the said bank receiver for the said building and the rents and profits thereof. Thereafter the appellant, Celle Becker, filed her sworn answer to the said bill, and on March 16, 1929, Judge Brothers, upon her giving a bond in the penal sum of $35,000, signed by her, as principal, and the National Surety

[illegible]

CHICAGO TITLE AND TRUST COMPANY,
as Trustee,

Appellee,

v.

CELIA MOONEY et al.,

Defendants.

CELIA BOONE,

Appellant.

MR. JUSTICE SCHAAD DELIVERED THE OPINION OF THE COURT:

This appeal is prosecuted by Celia Boone to have review an interlocutory order of the Circuit Court of Cook County appointing Freeman Trust & Savings Bank receiver for the apartment building located on the northwest corner of Kenmore and Hollywood avenues, Chicago. The order was entered upon the motion of and supplemental bill of complaint filed by the Chicago Title and Trust Company, trustee, to foreclose a certain trust deed given by Celia Boone about June 20, 1927, to secure the principal sum of $[illegible], and interest.

On February 11, 1929, [illegible] the Chicago Title and Trust Company, trustee, filed their bill of complaint to foreclose the above mentioned trust deed on the property [illegible] on February 16, 1929, Judge Brothers, one of the chancellors of the Circuit Court, appointed the said Boone trustee for the sale, selling and the rents and profits thereof. [illegible] Celia Boone, filed her sworn answer to the said bill, and on March 16, 1929, Judge Brothers, upon her motion, [illegible] of $25,000, signed by her, as principal, and [illegible]

Company, as surety, to obtain the discharge of the receiver, entered an order directing the receiver to surrender the property to her. On March 22, 1929, the Chicago Title & Trust Company, trustee (sole complainant) filed a verified amended and supplemental bill to foreclose the said trust deed and to have a receiver appointed. This bill alleged (inter alia) that Celle Becker was indebted in the sum of $250,000, as evidenced by her note; that said note was secured by a trust deed to the complainant as trustee, conveying certain real estate and the rents, issues and profits therefrom; that by said deed Celle Becker expressly covenanted to make certain deposits on account of principal and interest, to pay all taxes and assessments, and not to suffer any mechanics' liens to attach, and that she further covenanted that in case of default in the payment of any installment of principal, or in case of default for three days in making the payment of any installment of interest, or in case of default for a period of twenty days in the payment of any deposits, or in case of a breach of any of the covenants, the complainant (Chicago Title & Trust Company, as trustee), for the benefit of the holder or holders of the note, should have the right immediately to foreclose said trust deed. The bill further alleged that Prudence Company, Inc., was the original holder and owner of the mortgage note, and that on August 11, 1927, it sold the note to Supreme Council of Royal Arcanum and that by the sale it guaranteed to said Council the payment of the principal of the note and also the payment of the interest on the same at the rate of five and one-half per cent from August 11, 1927, and that it retained the right to exercise any right or option secured to or insured by the note or trust deed, including the right to enforce payment thereof; that the mortgagor (Celle Becker) has defaulted (1) in the payment of the balance ($225.26) of the semi-annual interest that fell due June 17, 1928; also in the payment of the full semi-annual install-

company, no surety, to obtain the signature of the receiver, entered an order directing the receiver to surrender the property to her. On March 23, 1926, the Chicago Title & Trust Company, trustee (sole complainant) filed a verified amended and supplemental bill to foreclose the said trust deed and to have a receiver appointed. This bill alleged (inter alia) that Della Becker was indebted in the sum of $2400.000, as evidenced by her notes; that said note was secured by a trust deed to the complainant as trustee, conveying certain real estate and the rents, issues and profits thereofrom; that by said deed Della Becker expressly covenanted to make certain deposits on account of principal and interest, to pay all taxes and assessments, and not to suffer any mechanics' liens to attach; and that she further covenanted that in case of default in the payment of any installment of principal, or in case of default for three days in making the payment of any installment of interest, or in case of default for a period of twenty days in the payment of any deposits, or in case of a breach of any of the covenants, the complainant (Chicago Title & Trust Company, as trustee), for the benefit of the holder or holders of the note, should have the right immediately to foreclose said trust deed. The bill further alleged that Prudence Company, Inc., was the original maker and owner of the mortgage note, and that on August 13, 1921, it sold the note to Supreme Council of Royal Arcanum and that by the sale it guaranteed to said Council the payment of the principal of the note and also the payment of the interest on the same at the rate of five and one-half per cent from August 13, 1921, and that it relinquished the right to exercise any right or option covering it or insured by the note or trust deed, including the right to enforce payment thereof; that the mortgagor (Della Becker) has defaulted (1) in the payment of the balance ($323.32) of the semi-annual interest due July and June 13, 1923, also in the payment of the July semi-annual installmen

ment of interest that fell due December 17, 1928, amounting to $7,500, which defaults have continued for more than three days; (2) in the making of monthly deposits on account of principal since the month of June, 1928, which aggregated $4,545.40, and which defaults continued for more than twenty days; (3) in the failure to pay the 1926 general taxes, amounting to $4,212.83 and permitting a sale of the premises therefor; (4) in the failure to pay a special assessment and for permitting a sale of the mortgaged premises for the sum of $101.35; (5) in permitting the premises to be subjected to the lien of eight mechanics' liens and thirty-one judgments; (6) in permitting the premises to be sold upon three execution sales. It further alleged that Prudence Company, Inc., in compliance with its contract of guaranty, had advanced certain moneys to Supreme Council of Royal Arcanum equal to five and one-half per cent of the past due interest, but that neither the mortgagor nor anyone in her behalf had paid said interest; that Prudence Company, in its own right and as agent for Supreme Council of Royal Arcanum, had declared the whole debt to become due and payable, and the complainant, Chicago Title & Trust Company, as trustee, had elected to foreclose said trust deed; that the trust deed expressly pledges the rent, issues and profits, and provides for the appointment of a receiver without notice and without bond, and without reference to the value of the premises or the use of the same as a homestead, and without reference to the solvency or insolvency of the mortgagor; that the mortgaged premises in their present condition offer scant security, and that the mortgagor is insolvent; that the mortgagor, in violation of her covenants in the trust deed, has collected rent in advance, in excess of $8,000; that the complainant has been compelled to incur certain expenses, including solicitor's fees; that the mortgaged premises are subject to four junior mortgages, and to the claims of various persons, and to outstanding certificates of sale, and

mark of interest that fell due December 17, 1928, amounting to $7,500, which defaults have continued for more than three years; (2) in the making of monthly deposits on account of principal since the month of June, 1928, which aggregated $4,868.40, and which defaults continued for more than twenty days; (3) in the failure to pay the 1930 general taxes, amounting to $4,812.82 and permitting a sale of the premises therefore; (4) in the failure to pay a special assessment and for permitting a sale of the mortgaged premises for the sum of $121.38; (5) in permitting the premises to be subjected to the lien of eight mechanics' liens and thirty-one judgments; (6) in permitting the premises to be sold upon three execution sales. It further alleges that Endowment Company, Inc., in compliance with its contract of guaranty, had advanced certain moneys to Supreme Council of Royal Arcanum equal to five and one-half per cent of the past due interest, but that neither the mortgagor nor anyone in her behalf had paid said interest; that Endowment Company, in its own right and as agent for Supreme Council of Royal Arcanum, had declared the whole debt to become due and payable, and has complained; Chicago Title & Trust Company, as trustee, has elected to foreclose said trust deed; that the trust deed expressly pledges the rents, issues and profits, and provides for the appointment of a receiver without notice and without cause, and without reference to the value of the premises or the use of the same as a homestead, and without reference to the solvency or insolvency of the mortgagor; that the mortgaged premises is vacant present condition of an acute monthly, and that the mortgagor is insolvent; that the mortgagee, in violation of her covenants in the trust deed, has collected rent in excess, in excess of $8,000; that the complainant has been compelled to incur certain expenses, including solicitor's fees; that the mortgaged premises are subject to four junior mortgages, and to the claims of various persons, and to outstanding certificates of sale, and

prays for the foreclosure of said trust deed and for the appointment of a receiver during the pendency of the proceedings. Thereafter the appellant filed her verified answer to said amended and supplemental bill and therein alleged (inter alia) that she had paid $20,000 usurious commission to Prudence Company; further, that the note and trust deed sought to be foreclosed were owned by the Supreme Council of Royal Arcanum and had been in its possession continuously since 1927; denied that said Council had authorized R. I. Davis or the Chicago Title & Trust Company, trustee, to institute foreclosure proceedings, and denied any default in interest payable in June,1928; averred that a guaranty policy in the sum of $250,000 had been issued by the Chicago Title & Trust Company, guaranteeing the lien of the trust deed; further averred that the Prudence Company, before advancing any of its loans, insisted that the appellant furnish to the owners of said indebtedness herein a mortgage guaranty policy of the Chicago Title & Trust Company in the sum of $250,000, to protect the said owners against any liens and defects in the title, judgments, tax sales, mechanics' liens or claims or rights of parties in possession to the extent of $250,000, and that the appellant furnished such policy to the Prudence Company, Inc., of Illinois and to the Chicago Title & Trust Company, as trustee.

On March 29, 1929, complainant, Chicago Title & Trust Company, as trustee, moved the chancellor (Judge Brothers) "for the appointment of a Receiver, or in the alternative, for a reference of said motion to a Master in Chancery," and on April 6, 1929, the said chancellor "ordered that the motion of complainant be referred to Roswell B. Mason, Master in Chancery of this court, to take proofs of the respective parties, with reference to the appointment of a receiver." On May 9, 1929, the master made a report in which he recommended that a receiver be appointed. Objections to the report were overruled and on May 13, 1929, the cause came up for

pays for the foreclosure of this trust deed and for the appointment of a receiver during the pendency of the proceedings. Thereafter the appellant filed her verified answer to said sworn and complicated bill and therein alleged (inter alia) that she had paid $20,000 premium commission to Prudence Company; further, that the note and trust deed sought to be foreclosed were owned by the Prudence Council of Equal Economy and had been in its possession continuously since 1927; denied that said Council had authorized M. I. Davis or the Chicago Title & Trust Company, trustee, to institute foreclosure proceedings, and denied any default in interest payable in June, 1928; averred that a guaranty policy in the sum of $20,000.00 was issued by the Chicago Title & Trust Company, guaranteeing the life of the trust deed; further averred that the Prudence Company, before advancing any of its funds, insisted that the Appellant furnish to the owners of said indebtedness herein a guaranty insurance policy of the Chicago Title & Trust Company in the sum of $20,000, to protect the said owners against any liens and defects in the title, judgments, tax sales, mechanics' liens or claims or rights of persons in possession to the extent of $20,000, and that the appellant furnished such policy to the Prudence Company, Inc., of Illinois and to the Chicago Title & Trust Company, as trustee.

On March 14, 1929, complainant, [illegible] Title & Trust Company, as trustee, [illegible] (under [illegible]) for the appointment of a receiver, or in the alternative, for a decree of paid motion to a Master in Chancery, and on April [illegible], the said chancellor ordered that the motion of complainant be referred to Roswell B. Mason, Master in Chancery of this court, to take proofs of the respective parties, with reference to the appointment of a receiver. On May 8, [illegible] the Master filed a report in which he recommended that a receiver be appointed. Objections to the report were overruled and on May 13, 1929, the court entered an

hearing before Judge Friend, a chancellor of the court, on a motion of the complainant to set for hearing the objections to the master's report, and on motion of the solicitor for appellant it was ordered that the objections filed to the master's report stand as exceptions. On May 15 Judge Friend entered an order overruling the exceptions to the master's report and appointing Foreman Trust & Savings Bank as receiver for the premises in question.

The material findings of the master, so far as this appeal is concerned, are: (1) That a receiver of the premises for the rents, issues and profits ought to be appointed; (2) that the allegations in the amended and supplemental bill with reference to the provisions of the trust deed and the alleged defaults were true; that the following were the defaults: (a) Default in the payment of interest due June 17, 1928, in the amount of $225.26; (b) default in the payment of the full semi-annual interest due December 17, 1928, amounting to $7,500; (c) default in the payment of the 1926 general taxes in the amount of $4,212.83, and that the premises have been sold therefor, and that no redemption has been made from said sale; (d) default in the payment of a special assessment for $101.35, and that the premises, because of said default, had been sold and that no redemption has been made thereunder; (e) that the mortgagor has permitted the premises to be subjected to the lien of eight separate mechanics' liens for various amounts ranging from $62.76 to $2,695, and (f) has suffered additional defaults in permitting the premises to be subjected to the lien of thirty-one judgments, varying in amount from $52.35 to $3,226.45; that twelve of the judgments were entered after July 11, 1927, the date of the recording of the trust deed in question, and that nineteen were entered prior to July 11, 1927; that as to the judgments that were entered prior to July 11, 1927, the mortgage guaranty policy for $250,000, furnished by appellant, protects the legal holder of the indebtedness covered by the said trust deed against the same; that the

hearing before Judge Pickard, a commissioner of the court, on a motion of the complainant to set for hearing the objections to the master's report, and on motion of the solicitor for appellant it was ordered that the objections filed to the master's report stand as exceptions. On May 15 Judge Pickard entered an order overruling the exceptions to the master's report and appointing Freeman Trust & Savings Bank as receiver for the premises in question.

The material findings of the master, so far as this appeal is concerned, are: (1) That a receiver of the premises for the rents, issues and profits ought to be appointed; (2) that the allegations in the amended and supplemental bill with reference to the provisions of the trust deed and the alleged defaults were true; that the following were the defaults: (a) Default in the payment of interest due June 17, 1926, in the amount of $[illegible]; (b) default in the payment of the full semi-annual interest due December 17, 1926, amounting to $7,[illegible]; (c) default in the payment of the 1924 general taxes in the amount of $4,[illegible], and that the premises have been sold therefor, and that no redemption has been made from such sale; (d) default in the payment of a special assessment for $[illegible], and that the premises because of said default, had been sold and that no redemption has been made therefrom; (e) that the mortgagor has permitted the premises to be subjected to the lien of eight mechanic mechanics' liens for various amounts ranging from $[illegible] to $[illegible], and (f) has authorized additional defaults in permitting the premises to be subjected to the lien of thirty-one judgments, varying in amount from $[illegible] to $[illegible]; that twelve of the judgments were entered after July 11, 1927, the date of the recording of the trust deed in question, and that nineteen were entered prior to July 11, 1927; that as to the judgments that were entered prior to July 11, 1927, the mortgage guaranty policy for $250,000, furnished by appellant, protects the legal holder of the indebtedness secured by the main trust deed against the money that the

answer of the appellant does not deny or dispute the validity of the judgments rendered since July 11, 1927; (3) that the value of the premises, land and improvements, is $300,000 and is scant security for the mortgage debt; (4) that appellant is no longer the owner of the equity of redemption, but that said equity is vested in Martin J. Ahern, one of the defendants, by virtue of a judgment, levy and sale, and the issuance of a bailiff's deed and a quit-claim deed from Carey W. Rhodes and wife; (5) that the complainant is not bound to take a bond in lieu of the rent, since rents have been collected in advance, and the bond in any event would be security only for the rents collected after its execution and would not cover rents wrongfully collected in advance.

The appellant has seen fit to argue that R. I. Davis, one of the complainants in the original bill, did not own the note that formed the basis of the foreclosure proceedings and that she never had any right or authority to declare the note due or to file the foreclosure proceedings. As the instant appeal is from the order appointing a receiver upon the amended and supplemental bill filed by the Chicago Title & Trust Company, trustee, alone, we deem it entirely unnecessary to pass upon the merits of this argument.

The appellant contends that "after Judge Brothers appointed a receiver for the property and required Celle Becker, appellant, to furnish surety bond in the sum of $35,000, upon such terms and conditions as he required, to protect mortgagee on rents then Judge Friend should not have sat in judgment of Judge Brothers and order and appoint a receiver and again take property." This contention has been argued strenuously and with considerable feeling, but we are unable to find the slightest merit in it. It was Judge Brothers who entertained the motion of the complainant in the amended and supplemental bill, for the appointment of a receiver, and referred it to the master. We find nothing in the record to indicate that

answer of the appellees does not deny or dispute the validity of the judgments rendered since July 11, 1927; (3) that the value of the premises, land and improvements, is $250,000 and is ample security for the mortgage debt; (4) that appellant is no longer the owner of the equity of redemption, but that said equity is vested in Martin J. Amara, one of the defendants, by virtue of a judgment, levy and sale, and the issuance of a sheriff's deed and a quit-claim deed from Gerry . Rhodes and wife; (5) that the complainant is not going to take a bond in lieu of the real, since rents have been collected in advance, and the bond in any event would be security only for the rents collected after the execution and would not cover rents erroneously collected in advance.

The appellant has been fit to argue that R. I. Davis, one of the complainants in the original bill, did not own the note that formed the basis of the foreclosure proceedings and that the novel had any right or authority to declare the note due or to file the foreclosure proceedings. At the instant appeal is from the order appointing a receiver upon the amended and supplemental bill filed by the Guaranty Title & Trust Company. Whether, alone, it does it contain necessary to pass upon the merits of this argument.

The appellant contends that a later judge erroneous appointed a receiver for the property and in entire [illegible], appellant, to furnish surety bond in the sum of $25,000, upon such terms and conditions as he required, to prevent mortgage on rents from judge Tolend should not have set in judgment of judge Tolenden and grant and appoint a receiver and eviction of the property." This contention has been argued extensively and with considerable feeling, but we are unable to find the slightest merit in it. If the judge Tolenden who entertained the motion of the complainant in the amended and supplemental bill, for the appointment of a receiver, was referred it to the master. We find nothing in the record to indicate that

the appellant made any objection to the entry of this order. Counsel for the appellant made his motion before Judge Friend to have the objections of appellant to the master's report stand as exceptions, and, so far as the record shows, the hearing before Judge Friend on the master's report was had without any objection by the appellant. Judge Friend had jurisdiction to hear the proceedings in question and we must assume, in the absence of any showing to the contrary, that the matter came on before him in due course. The present contention of the appellant is clearly an afterthought and it hardly merits notice.

The appellant contends that the complainant in the amended and supplemental bill had no legal right or authority to bring foreclosure and receivership proceedings; that Supreme Council of Royal Arcanum, alone, could maintain the said proceedings. The amended and supplemental bill alleges that the complainant, Chicago Title & Trust Company, as trustee, pursuant to the provisions of said trust deed and for the purpose of protecting the holders and owners of said note, and pursuant to the powers vested in it as trustee, under the laws of the State of Illinois, has elected, and does by the filing of said bill elect, to foreclose the lien of the trust deed. The power of the said trustee to file the bill is clearly conferred by clause five of the trust deed. The bill also alleges that Prudence Company, in its own behalf and as the duly authorized agent of Supreme Council of Royal Arcanum, had declared the whole of the principal sum due. Moreover, it appears that Supreme Council of Royal Arcanum and also Martin J. Ahern not only did not oppose the appointment of the receiver in the present proceedings but that they apparently favored it. We find no merit in the instant argument of the appellant.

We have carefully read the record and we are satisfied that the master gave the parties before him a full and fair hearing

the appellant made any objection to the entry of this order. Counsel for the appellant made his motion before Judge Friend to have the objections of appellant to the master's report stand as exceptions, and, so far as the record shows, the hearing before Judge Friend on the master's report was had without any objection by the appellant. Judge Friend had jurisdiction to hear the proceedings in question and to make examine, in the absence of any showing to the contrary, that the matter came on before him in due course. The present contention of the appellant is clearly an afterthought and is hardly worthy notice.

The appellant contends that the complainant in the amended and supplemental bill had no legal right or authority to bring foreclosure and receivership proceedings; that a supreme council of Royal Arcanum, alone, could maintain the main proceedings. The amended and supplemental bill alleges that the complainant, Chicago Title & Trust Company, as trustee, pursuant to the provisions of said trust deed and for the purpose of protecting the holders and owners of said note, and pursuant to the powers vested in it as trustee, under the laws of the State of Illinois, has elected, and does by the filing of said bill elect, to foreclose the lien of the trust deed. The power of the said trustee to file the bill is clearly conferred by clause five of the trust deed. The bill also alleges that Insurance Company, in its own behalf and as the duly authorized agent of Supreme Council of Royal Arcanum, has complied the duties of the principal sum due. Moreover, it appears that Supreme Council of Royal Arcanum and also Martin J. Burke not only at no appears the appointment of the receiver in the present proceedings but that they apparently favored it. We find no merit in the contention of the appellant.

We have carefully read the record and we are satisfied that the master gave the parties before him a fair and just hearing

and that his findings were amply justified by the evidence, and we are unable to see any merit in the contention of the appellant that the appointment of the receiver was not warranted under the facts. In arriving at this conclusion we have not deemed it necessary to consider that part of the master's report wherein he finds that the appellant's equity of redemption had been sold to Martin J. Ahern and that therefore she had no longer any right, title or interest in or to the mortgaged premises or to the rents, issues and profits therefrom.

The interlocutory order of the Circuit Court of May 13, 1929, is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

and that his findings were merely [illegible] by the [illegible],
and we are unable to see any merit in the contention of the
appellant that the expenditure of [illegible] was not warranted
under the facts. In arriving at this conclusion we have not
deemed it necessary to consider that part of the master's report
wherein he finds that the appellant's duty of [illegible] had
been paid to Mrs. [illegible]. Here are that therefore the lower
may right, title or interest in or to the mortgaged premises or
to the rents, issues and profits therefrom.

The interlocutory order of the Circuit Court of May
15, 1930, is affirmed.

AFFIRMED.

Mr. Justice [illegible] and Stirling, dissent.

33736

255 I.A. 622

ABNER T. BOWEN, JOSEPH BEEN, FRANK P. ATKINSON and LAURA GRIFFITHS, copartners, trading as A. T. BOWEN & CO., Bankers, Appellees,

v.

PETER P. CROARKIN, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, Abner T. Bowen, Joseph Been, Frank P. Atkinson and Laura Griffiths, Co-partners, trading as A. T. Bowen & Co., Bankers, plaintiffs, sued Peter P. Croarkin, defendant. There was a trial before the court, with a jury, and at the close of all the evidence the court instructed the jury to return a verdict for the plaintiffs in the sum of $5,336.14. Judgment was entered on the verdict and this appeal followed. The declaration consisted of two counts. In the first it was alleged that the defendant, on January 4, 1927, made his promissory note, bearing the same date, by which he promised to pay, one year after the date thereof, to the order of Patrick H. O'Donnell the sum of $5,000, with interest at five per cent per annum; that the note was delivered on the same dateto O'Donnell, and that thereupon O'Donnell assigned the note, by indorsement, to the plaintiffs. Count two consisted of the common counts. Attached to the declaration was a copy of the note and an affidavit averring (inter alia) that before the maturity of the note O'Donnell indorsed and delivered the same to the plaintiffs and that they are now the bona fide holders of it. The defendant filed a plea of the general issue

Serve

ALBERT T. ROSEN, JOSEPH ROSEN,
FRANK P. ATKINSON and LAURA
GRIFFITHS, copartners, trading
as A. T. ROSEN & CO., Bankers,
Appellees,

v.

PETER P. CROMELIN,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE CARMAN DELIVERS THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, Albert T. Rosen, Joseph Rosen, Frank P. Atkinson and Laura Griffiths, co-partners, trading as A. T. Rosen & Co., Bankers, plaintiffs, sued Peter P. Cromelin, defendant. There was a trial before the court, with a jury, and at the close of all the evidence the court instructed the jury to return a verdict for the plaintiffs in the sum of $7,356.14. Judgment was entered on the verdict and this appeal followed. The dealer sign consisted of two sources. In the first it was alleged that the defendant, on January 4, 1897, made his promissory note, bearing the same date, by which he promised to pay, one year after the date thereof, to the order of Patrick O. O'Donnell the sum of $5,000, with interest at five per cent per annum; that the note was delivered to the same Patrick O'Donnell, and that thereupon O'Donnell assigned the note, by indorsement, to the plaintiffs. Count two consisted of the usual counts. Attached to the declaration was a copy of the note and an affidavit averring (inter alia) that before the maturity of the note O'Donnell indorsed and delivered the same to the plaintiffs and that they are now the bona fide holders of it. The defendant filed a plea of the general issue

and also four special pleas. In the first he alleged that the note was assigned to the plaintiffs after it became due; that the consideration for the same was the agreement of O'Donnell to perform certain legal services in connection with a criminal case then pending in Cook County; that O'Donnell, then a member of the Cook County bar, failed to perform proper legal services in connection with the trial of the said case and that therefore the consideration for the note failed. The second special plea alleged that O'Donnell agreed that he would render proper legal services which would prevent the conviction of the defendant's son in said criminal case and that the note would not take effect as a note if the son were convicted. The third special plea alleged that O'Donnell agreed to hold the note and not negotiate it and to return it to the defendant if the legal services he rendered did not prevent the conviction of the defendant's son. The fourth special plea alleged that O'Donnell agreed not to negotiate the note, and to hold it so that it might be renewed if the defendant so desired. To each of the special pleas the plaintiffs filed a replication alleging that they became holders of the note before maturity, for value, in good faith and without knowledge of any defects in the title of O'Donnell, as alleged in each of the special pleas, and to the first special plea the plaintiffs further replied that O'Donnell did perform the legal services in question and in a careful, diligent and skillful manner, and to the second, third and fourth special pleas the plaintiffs further replied denying the agreement alleged in each of the said pleas.

The only issues raised on this appeal are, first, have the plaintiffs proved that they are bona fide holders of the note, and, second, are there any facts and circumstances in the case from which a fair and reasonable inference might be reasonably drawn that the plaintiffs are not holders in due course.

The Negotiable Instruments Act defines a holder in due

and also four special pleas. In the first he alleged that the note was assigned to the plaintiffs after it became dead, that the consideration for the same was the agreement of O'Donnell to pay to certain legal services in connection with a criminal case then pending in Cook County that O'Donnell, then a member of the Cook County bar, failed to perform proper legal services in connection with the trial of the said case and that therefore the consideration for the note failed. The second special plea alleged that O'Donnell agreed that he would render proper legal services which would prevent the conviction of the defendant's son in a criminal case and that the note would not have existed as a note if the son had been convicted. The third special plea alleged that O'Donnell agreed to hold the note and not negotiate it and to return it to the defendant if the legal services he rendered did not prevent the conviction of the defendant's son. The fourth special plea alleged that O'Donnell agreed not to negotiate the note, and to hold it on the ground that it might be removed if the defendant so desired. To each of the special pleas the plaintiffs filed a replication alleging that they became holders of the note before maturity, for value, in good faith and without knowledge of any defects in the title of O'Donnell, as alleged in each of the special pleas, and to the third special plea the plaintiffs filed a replication that O'Donnell did perform the legal services in question and in a careful, diligent and skillful manner, and to the second, third and fourth special pleas the plaintiffs further replied [illegible] the agreements alleged in each of the special pleas.

The only issues raised on this appeal are, first, have the plaintiffs proved that they are the [illegible] holders of the note, and, second, are there any facts [illegible] or the jury [illegible] a fair and reasonable inference which [illegible] that the plaintiffs are not holders in due course.

The negotiable instrument [illegible] is due

course as one who takes the instrument under the following conditions: "1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The note in question is an ordinary promissory note in the usual form and there is nothing on the face of the instrument to excite suspicion or to raise a question in the mind of the taker of any defect in the title of O'Donnell or of his right to negotiate it. The note, by its terms, became due on January 4, 1928, and the undisputed evidence is that the plaintiffs became the holders of the same on February 12, 1927. On this last date, and for many years prior thereto, plaintiffs were co-partners engaged in the banking business at Delphi, Indiana. Patrick H. O'Donnell was an attorney of prominence, practicing at the Chicago bar. He owned considerable land in the neighborhood of Delphi and was very well known to the plaintiffs. He had been for a number of years a customer of the plaintiffs and had been in the habit of obtaining loans from them and giving his notes therefor. His indebtedness to the plaintiffs would vary from $5,000 to $20,000. On February 12, 1927, he was indebted to them, between $7,000 and $8,000, on two promissory notes, both of which were then past due, and upon which interest had not been paid for a considerable time. One of the notes, dated June 13, 1922, was executed by O'Donnell and Frank H. Smith for the sum of $5,400, and was payable to the order of the plaintiffs one year after the date thereof, with interest at eight per cent per annum. The other, a demand note for $3,232.62, dated February 12, 1926, was executed by O'Donnell and payable to the order of plaintiffs, with interest at eight per cent per annum. Prior to February 12, 1927, plaintiffs had several times written to O'Donnell concerning these

course an one who takes the instrument under the following conditions:
"1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The note in question is an ordinary promissory note in the usual form and there is nothing on the face of the instrument to arouse suspicion or to raise a question in the mind of one taker of any defect in the title of O'Donnell or of his right to negotiate it. The note, by its terms, becomes due on January 6, 1927, and the undisputed evidence is that the plaintiffs become the holders of the same on February 16, 1927. On this last date, one far more prior thereto, plaintiffs were co-partners engaged in the banking business at Delphi, Indiana. Patrick H. O'Donnell was a stockbroker of prominence, practicing at the Chicago Bar. He owns considerable land in the neighborhood of Delphi and was very well known to the plaintiffs. He had been for a number of years a customer of the plaintiffs and had been in the habit of obtaining loans from them on giving his notes therefor. His indebtedness to the plaintiffs would vary from $[illegible] to $[illegible]. On February 12, 1927, he was indebted to them, between $[illegible] and $[illegible], on two promissory notes, both of which were then past due, and on which interest had not been paid for a considerable time. One of the notes, dated June 17, 1926, was executed by O'Donnell and [illegible] for the sum of $[illegible], and was payable to the order of the plaintiffs one year after the date thereof, with interest at eight per cent per annum. The other, a demand note for $[illegible], dated March 17, 1927, was executed by O'Donnell and payable to the order of plaintiffs, with interest at eight per cent per annum. Prior to February 12, 1927, plaintiffs had several times written to O'Donnell concerning these

past due notes. In response to these letters the latter, on February 12, 1927, went to plaintiffs' bank at Delphi, in company with his private secretary, and he there produced the note of the defendant and indorsed the same and delivered it to the assistant cashier. At the same time O'Donnell stated to the latter that the defendant was a man worth $50,000 or $100,000 and that the note was perfectly good and that he wanted to deposit it as collateral security for his loans; that later on he would be able to pay something on them but that he wished to leave the note of the defendant with the bank to secure the loans in order that the bank might feel perfectly safe in reference to his indebtedness. The assistant cashier took the note, examined it, and then "pinned it to the principal note for which it was deposited for collateral security."

> "It is the well established law in this jurisdiction that an indorsee of a negotiable note who has taken it, before its maturity, as collateral security for a pre-existing debt and without any express agreement is deemed a holder for a valuable consideration." (Elgin Nat'l Bank v. Goecke, 295 Ill. 403, 407.)

> "When negotiable paper is indorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee, who takes the paper without notice of any defense is a holder for value in the usual course of business." (Anderson v. Keystone Supply Co., 293 Ill. 468.)

The defendant contends that the note in question was not intended as a negotiable instrument, and that the title of O'Donnell to it was defective because he had guaranteed the defendant that the latter's son, who was then a defendant in a criminal case, would not be hanged or go to Joilet penitentiary and that if the result of the trial in the Criminal Court were unsatisfactory to the defendant he (O'Donnell) would return the note to the defendant; that the son of the defendant, as the result of the trial in the Criminal Court was sentenced to the penitentiary at Joilet and that the conduct of the trial by O'Donnell was unsatisfactory to the defendant, and that therefore the consideration for the note completely failed. In

past due notes. In response to these letters the latter, on February 18, 1927, went to plaintiffs' bank at Delphi, in company with his private secretary, and he there produced the note of the defendant and indorsed the name and delivered it to the assistant cashier. At the same time O'Donnell stated to the latter that the defendant was a man worth $60,000 or $100,000 and that the note was perfectly good and that he wanted to deposit it as collateral security for his loans; that later on he would be able to pay something on them; that he wished to leave the note of the defendant with the bank to secure the loans in order that the bank might feel perfectly safe in reference to his indebtedness. The assistant cashier took the note, examined it, and then "placed it to the principal note for which it was deposited for collateral security."

> "It is the well and binding law in this jurisdiction that an indorsee of a negotiable note who has taken it, before its maturity, as collateral security for a pre-existing debt and without any express agreement is deemed a holder for a valuable consideration." (Lynn Nat'l Bank v. Dossey, 209 Ill. 403, 407.)

> "Non-negotiable paper is indorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee, who takes the paper without notice of any defense is a holder for value in the usual course of business." (Anderson v. Hoyleton Supply Co., 291 Ill. 466.)

The defendant contends that the note in question can not be treated as a negotiable instrument, and that the title of O'Donnell to it was defective because he had guaranteed the defendant that the latter's son, who was then a defendant in a criminal case, would not be hanged or go to Joliet penitentiary and that if the result of the trial in the Criminal Court were unsatisfactory to the defendant he (O'Donnell) would return the note to the defendant; that the son of the defendant, as the result of the trial in the criminal court was sentenced to the penitentiary at Joliet and that the conduct of the trial by O'Donnell was satisfactory to the defendant, and that therefore the consideration for the note completely failed. In

reference to this contention we may say that the defendant offered evidence tending to support the same. This evidence, of course, would not be binding on the plaintiffs unless at the time they received the note they had notice of some infirmity in the instrument or of some defect in the title of O'Donnell. But the defendant further contends that "the plaintiffs received said note with some knowledge of its defects and infirmities for they knew it was given for services to be rendered by O'Donnell who, they knew, was a very sick man, and, therefore, unable to perform them."

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." (Sec. 56, ch. 98, Callaghan's Ill. St. Ann., Vol. 6, p. 5334.)

> "Only bad faith will defeat the title of the endorsee of commercial paper taken before maturity, for value and without knowledge of any defense thereto. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the endorsee in acquiring the paper, will not defeat his title." (Kavanagh v. Bank of America, 239 Ill. 404, 408.)

After a careful consideration of all the facts and circumstances bearing upon the instant contention of the defendant, we are satisfied that the undisputed evidence establishes that the plaintiffs took the note as collateral security for a pre-existing indebtedness of O'Donnell, before it became due; that it was taken by the plaintiffs in the usual course of their business as bankers and that there was nothing about the instrument or the circumstances surrounding the transaction, at the time of the delivery of the note to the plaintiffs, that was calculated to excite suspicion of any infirmity in the instrument or of any defect in the title of O'Donnell, or of his right to negotiate it, nor is there any evidence, nor are there any facts or circumstances, from which a fair and reasonable inference might be reasonably drawn that the action of the plaintiffs in taking the instrument in question amounted to bad faith.

reference to this contention we may say that the defendants offered evidence tending to support the same. This evidence, of course, could not be binding on the plaintiffs unless at the time they received the note they had notice of some infirmity in the instrument or of some defect in the title of the maker. But the defendant further contends that "the plaintiffs received and note with some knowledge of the defects and infirmities for they knew it was given for services to be rendered by the maker, they knew, - a very sick man, and, therefore, unable to protect himself."

> "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." (See, 3 Ill. 94, Gillespie's Ill. R. Rep., Vol. 3, p. 3414.)

> "Only bad faith will affect a title of the purchaser of commercial paper taken before maturity, for value and without knowledge of any defects therein. Mere suspicion, the knowledge of circumstances calculated to excite suspicion, or even gross negligence of the purchaser in not ascertaining the paper, will not defeat his title." Cummings v. Park, 2 Bradwell, 1.

After a careful consideration of all the facts and circumstances bearing upon the issue, relative to the defendant, we find the evidence that the maker, who was a relative of the plaintiffs took the note in collateral security for a pre-existing indebtedness of O'Donnell, before it became due; that it was taken by the plaintiff in the usual course of their business. There is no fact tending to show that the transfer of the note was anything about the transaction or the circumstances surrounding the transaction, or the time of the delivery of the note to the plaintiff, that was calculated to excite suspicion of an infirmity in the instrument or of any defect in the title of the maker, or of a right to negotiate it, nor is there any evidence, nor are there any facts or circumstances, from which a fair and reasonable inference might be reasonably drawn that the action of the plaintiff in taking the instrument in question amounted to bad faith.

The defendant has searched the record in a strenuous effort to find facts or circumstances that might justify his contention that the case should have been submitted to the jury. Each of the two notices sent by the plaintiffs t the defendant contained the following printed form at the top of the letterhead:

> "A. T. Bowen & Co., Bankers
> Established 1837 - Over 89 years continuous business without default in their Obligations.
> Money received on deposit subject to check; interest paid on deposit subject to check 3 to 4½ per cent; on certificate of deposit 3 to 5 per cent. Money loaned on approved personal or real estate security. Drafts issued available at all points. Secured notes bought at fair rates. Notes collected, when paid upon notice, for 25 cents per $100, or fraction thereof; when further effort is required, at reasonable rates. Deposit your money in some Bank and Make all your payments by Bank Checks, which is the safest, surest and best way." (Italics ours.)

The defendant uses the portion of the above form which we have italicized as a ground for a contention that the plaintiffs "never got the note for collateral; they got it after maturity for collection 'at 25 cents on $100.00.'" As the defendant has failed to call our attention to any evidence, having any probative force, that tends to sustain the contention that the plaintiffs got the note "after maturity for collection at 25 cents on $100.00," the present contention hardly merits notice. The assistant cashier of plaintiffs' bank frankly stated that he had read in the Chicago Tribune that the son of the defendant had committed murder and that O'Donnell was one of the attorneys for the defense and that at the time that the latter gave them the note he assumed that it represented attorney's fees in connection with that case, and James .. Meagher, a witness for the defendant, testified that about three and one-half months after the commencement of the instant suit, he, in company with the defendant, went to Delphi and called at the plaintiff's bank and that "either Mr. Been or Mr. Bowen said that they knew at the time that the note was received that Mr. O'Donnell was a very sick man," and the defendant argues from this evidence that "the plaintiffs received said note with knowledge of some

The defendant has attacked the proof in a strenuous effort to find facts or circumstances that might justify the conclusion that the case should have been submitted to the jury. Each of the notices sent by the plaintiffs to the defendant contained the following printed form at the top of the letterhead:

> "A. T. Brown & Co., Bankers
> Established 1877 - Over 60 years continuous business
> without default in their obligations.
> "Money received on deposit subject to check in general interest
> paid on deposits subject to check 3 to 6 per cent; on
> certificates of deposits 3 and 4 per cent. Money loaned on
> approved personal or real estate security. Funds loaned
> available at all points. Courteous notes sought. A fair
> rates. Prompt collections, when paid make no charge, for all
> coupons per 100, or fractional amounts, have checks drawn
> in advance, at reasonable rates. Should your money be
> some that you will pay a premium by most banks, which
> is the method, ought not best way." (Italics ours.)

The defendant's case the testimony of the notes [illegible] or have identified as a prom[illegible] or a conversation that the plaintiffs never got the note for collection; they [illegible] other [illegible] for collection "at 28 cents on [illegible]." [illegible] defendant [illegible] all our attention to any evidence, having any [illegible], [illegible] to maintain the contention that the plaintiffs [illegible] for collection of 28 cents on "100." [illegible] contradictorily merits notice. The [illegible] of defendant's [illegible] stated that he [illegible] in the [illegible] the [illegible] defendant had [illegible] [illegible] of the [illegible] for [illegible] the note [illegible] with [illegible] [illegible] of the [illegible] of the [illegible] and called [illegible] the plaintiff's [illegible] Brown said that they knew [illegible] Mr. [illegible] was a very [illegible] man," and the [illegible] evidence that "the plaintiffs [illegible]

of its defects and infirmities, for they knew it was given for services to be rendered by O'Donnell, and knew that he was a very sick man and therefore unable to perform them. * * * And knew that the trial would start on the Monday following, the 14th instant, because they said they read about the case in the newspapers, then they were charged with sufficient notice and knowledge that he was unable to try the case and unable to earn such a fee as $5,000.00, and that such a claim would in all probability be contested; then, as prudent men and experienced business men, they knew that O'Donnell's title to said note was defective because the amount named was as yet not earned, and probably would never be earned because he might be unable to serve, he might be supplanted or he might resign from the case because of illness." The plaintiffs received the note on February 12, 1927. The brother of the defendant was an experienced lawyer and had been a very intimate friend of O'Donnell's for over thirty years. He testified that before the date of the execution of the note he had seen O'Donnell three or four times, on each of which occasions he had talked with the latter "about the question of fees in this case," but he gave no testimony concerning the health of O'Donnell during that period of time. This witness also testified that after holding various talks with O'Donnell concerning the question of fees, that he got the defendant, on January 4, 1927, to sign the negotiable note in question. The criminal trial started on February 14, 1927, and lasted for many weeks, during which time O'Donnell acted as an attorney for the defendant in that proceeding. In the light of these facts and circumstances the instant contention seems rather an idle one. Moreover, the proof of the defendant is to the effect that O'Donnell agreed that for all his services in connection with the criminal case, rendered or to be rendered by him, he was not to receive as compensation, in any event, more than the $5,000, and the brother of the defendant, the

of its duration and infinitude, for they knew it was given for
services to be rendered by O'Donnell, and knew that he was a very
sick man and therefore unable to perform them. [illegible] and knew that
the trial would start on the Monday following, the 11th instant,
because they said they knew those who were in the newspapers, that
they were charged with sufficient notice and knowledge that he was
unable to try the case and unable to [illegible] a week or two or [illegible],
and that [illegible] would in all probability be postponed; then,
as practical men and experienced business men, they knew that O'Donnell's
title to said rents was disputed by [illegible] and would need day or year
not [illegible], and probably could never be [illegible] because to might be
unable to recover, or even [illegible] [illegible] from the
case because of illness. The plaintiff [illegible] the week of Feb-
ruary 12, 1887. The history of the litigation was [illegible] lawyer
and had been a very intimate friend of O'Donnell's for many a thirty
years. He testified to a certain [illegible] of the existence of the note
he had seen O'Donnell show, or have claimed, on each of which occasions
he had talked with the latter about the question of fact in this case,
but he gave no testimony case [illegible] the health of O'Donnell during
that period of time. This witness also [illegible] talking
a phone talk with O'Donnell some time in the month of June, that he
got the defendant, on June xx 4, 1887, [illegible] the [illegible] note in
question. The criminal trial [illegible] on Tuesday [illegible], [illegible]
for many weeks, during which time O'Donnell was [illegible] for
the defendant in the proceeding. In the light of these [illegible]
circumstances the instant contention seems [illegible] in this case. Moreover, the proof of the [illegible] O'Donnell [illegible]
ch, for all his services as a [illegible] with [illegible] [illegible] conducted
or to be rendered by him, he was not [illegible] [illegible], in any
event, more than the "[illegible]", and the [illegible] in the [illegible], the

attorney, also testified that in the negotiations with O'Donnell he told the latter that he and the defendant wished O'Donnell to make the necessary preparations for the trial and that the latter did certain things in connection with the said preparations.

> "Knowledge by an indorsee that the note was given in consideration of an executory agreement by the payee does not deprive the holder of his character as a holder in due course, if the payee fails to perform, where the holder had no knowledge of the breach prior to his acquisition of the instrument." (8 C. J. 510, and cases cited in support of the text.)

A note is not made non-negotiable because of the mere possibility of failure of consideration after it is purchased. (See Woodlawn Security Finance Corp. v. Doyle, 252 Ill. App. 68, 81, and cases cited therein.)

We have carefully considered all the facts and circumstances relied upon by the defendant in support of his contention that the trial court should have allowed the case to go to the jury, and we are satisfied that there is no evidence in the record tending to contradict, in any material matter, the clear prima facie case made out by the plaintiffs. The defendant relies upon the case of Foncannon v. Lewis, 327 Ill. 455, but that case presents an entirely different state of facts from the instant one.

The defendant executed the note in question upon the advice of his brother, an attorney. The plaintiffs, bankers, took the note from O'Donnell, the payee, in good faith as collateral security for a pre-existing debt of the latter and without any notice of any infirmity in the instrument or of any defects in the title of O'Donnell. There is no evidence in the record that the defendant, after the trial of the criminal case, demanded the return of the note from O'Donnell. When the defendant received the notices from the plaintiffs demanding payment of the note he did not then inform the latter of any of the matters set up in his special pleas. He paid no attention to the notices, and on May 21, 1928, the plaintiffs were obliged to commence

attorney, also testified that in the negotiations with O'Donnell he told the latter that he and the defendants wished O'Donnell to make the necessary preparations for the trial and that the latter did certain things in connection with the said preparations.

> "knowledge by an indorsee that the note was given in consideration of an accidentally overpaid by the payee does not deprive the holder of his character as a holder in due course, if the payee fails to perform, where the holder had no knowledge of the fact, on prior to his acquisition of the instrument." (B. N. I. Sec. [illegible], and cases cited in support of the text.)

A note is not more non-negotiable because of the mere possibility of failure of consideration after it is purchased. (See Goldman Security Vinegar Corp. v. Lovin, 252 Ill. App. 61, 64, and cases cited therein.)

We have carefully considered all the facts and circumstances relied upon by the defendant in support of his contention that the trial court should have allowed the case to go to the jury, and we are satisfied that there is no evidence in the record tending to contradict, in any material matter, the oral or written case made out by the plaintiffs. The defendant relies upon the case of Bancroftown v. Lewis, 227 Ill. 454, but that case presents an entirely different state of facts from the instant case.

The defendant encouraged the note in question upon the advice of his brother, an attorney. The plaintiffs, however, took the note from O'Donnell, the payee, in good faith as collateral security for a pre-existing debt of the latter and without any notice of any infirmity in the instrument or of any defense in the hands of O'Donnell. There is no evidence in the record that the defendant, prior to the trial of the criminal case, demanded the return of the note from O'Donnell. When the defendant received the notice from the plaintiffs demanding payment of the note he did not then inform the latter of any of the matters set up in his special plea. He paid no attention to the notice, and on May 21, 1928, the plaintiffs were obliged to commence

the instant proceedings to enforce payment of the note. It was not until September, 1928, that the defendant saw fit to get in touch with the plaintiffs and to inform them of the alleged agreement with O'Donnell. If the defendant's contention in the instant case were sustained, it would be unsafe for banks to deal in negotiable papers.

The judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

the lawsuit proceedings to enforce payment of the notes. It was not until September, 1928, that the defendant was fit to get in touch with the plaintiffs and to inform them of the alleged agreement with O'Donnell. If the defendant's contention in the instant case were sustained, it would be unsafe for banks to deal in negotiable papers.

The judgment of the superior court of Cook County should be and it is affirmed.

AFFIRMED.

Barrett, P. J., and Sullivan, J., concur.

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ROLLIN COLEMAN,
Appellee,

v.

MICHAEL WROBEL, BUILDERS BOND AND MORTGAGE COMPANY, a Corporation, et al.,
Defendants.

BUILDERS BOND AND MORTGAGE COMPANY, a Corporation,
Appellant.

INTERLOCUTORY APPEAL FROM INTERLOCUTORY ORDER OF SUPERIOR COURT OF COOK COUNTY, APPOINTING A RECEIVER.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Builders Bond and Mortgage Company, a corporation, from an interlocutory order entered in the Superior Court of Cook County, appointing George W. Story receiver of certain real estate in Cook County, Illinois, which order was based upon the verified bill of complaint to foreclose a trust deed, filed by Rollin Coleman, appellee. The bill made Michael Wrobel, Builders Bond and Mortgage Company, a corporation, "Charles Penikoff, Receiver in Circuit Court Case No. B-158964," et al., defendants, and prayed that the defendants "may be required to make full, perfect and complete answer to said bill," etc.; "that a receiver be appointed during the pendency of this suit to take and have immediate possession of said premises; that such receiver have the power and authority to operate, manage and conserve said premises, to collect the rents, issues and profits thereof and other powers of receivers in like cases; that said receivership be continued until the statutory time for redemption from the sale of said premises," and that a writ of summons in chancery be issued as to all of the defendants named in the bill. The bill alleged (inter alia) that the

a corporation, [illegible] and Northern Illinois
Gas Company of Cook County, [illegible] Corporation [illegible] only [illegible]
real estate in Cook County, Illinois, which [illegible] be [illegible]
the verified bill of complaint to [illegible] a [illegible] [illegible] by
Rollin Coleman, appellee. The bill [illegible] Michael Rogers, [illegible]
Bond and Mortgage Company, a corporation, [illegible] [illegible],
receiver in [illegible] Court Case No. B-[illegible], et al., [illegible],
and prayed that the defendants [illegible] to [illegible] bill, [illegible]
fact and complete answer to [illegible] [illegible] [illegible] be
appointed during the pendency of [illegible] [illegible] have immediate
possession of said premises [illegible] and [illegible]
authority to operate, manage and conserve [illegible] premises, [illegible]
the rents, issues and profits thereof [illegible]
in like manner that said receivership be continued until the
statutory time for redemption from the sale of said premises, and
that a writ of summons in chancery be issued [illegible] all of the defen-
dants named in the bill. The bill [illegible] [illegible]

defendants, including "Charles Penikoff, Receiver in Circuit Court Case No. B-158964," "claim some interest or lien in fee to some lesser estate to or upon the real estate described therein, * * * that the right, title, interest and lien, if any, all said persons listed have or may have in and to such real estate, and in the subject matter of this suit, so held or claimed by said persons, is and are subject, inferior and subordinate to the lien of said trust deed herein to be foreclosed, and to the right, title, interest and lien of your orator."

Before the return day of the summons, appellee, after notice to the defendants, made a motion for the appointment of a receiver, and on August 19, 1929, the court entered the following order:

> "On motion of solicitor for complainant on notice duly served on all parties in interest and it appearing that a receiver ought to be appointed to take hold of and conserve the property, the subject matter of foreclosure;
>
> It Is Ordered that George W. Story be and he hereby is appointed as receiver in this cause with the usual powers of receivers in chancery provided that he file a bond in the sum of $1,000.
>
> Joseph B. David, Judge."

On August 24, 1929, the chancellor, without notice to the defendants, entered an order approving a bond of the receiver in the sum of $500.

The appellant contends that the Circuit Court and Superior Court of Cook County are courts of concurrent and co-ordinate jurisdiction and that the chancellor of the Superior Court erred in appointing a receiver, as it appears from the allegations of the bill that the Circuit Court had already appointed a receiver for the same premises. This contention is a meritorious one.

> "When a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of co-ordinate jurisdiction will not entertain a bill to administer the same property, and to take it from the possession of the former receiver, and to appoint its own receiver. In such a case, the parties aggrieved should seek relief in the court which is already in possession of the property through its receiver. * * * And the test as to priority is not to be found in the first actual, manual possession of the <u>res</u>, but the court which first asserts exclusive control by reason of having taken cognizance of the subject-matter of the litigation is entitled to proceed with the

defendants, including "Charles Bentley, Receiver in Circuit Court Case No. B-15276," "claim some interest or lien in fee to some interest adverse to or upon the real estate described therein, * * * that the right, title, interest and lien, if any, all said persons listed have or may have in and to such real estate, and in the subject matter of this suit, as held or claimed by said persons, is and are subject, inferior and subordinate to the lien of said trust deed herein to be foreclosed, and to the right, title, interest and lien of your orator."

Before the return day of the summons, appellee, after notice to the defendants, made a motion for the appointment of a receiver, and on August 18, 1955, the court entered the following order:

> "On motion of solicitor for complainant on notice duly served on all parties in interest and it appearing that a receiver ought to be appointed to take hold of and conserve the property, the subject matter of foreclosure;
>
> It is Ordered that Joseph E. Avery be and he hereby is appointed as receiver in this cause with the usual powers of receivers, in consideration provided that he file a bond in the sum of $1,000."

Joseph E. Avery, Judge.

On August 24, 1955, the chancellor, without notice to the defendants, entered an order approving a bond of the receiver in the sum of $500.

The appellant contends that the Circuit Court and Superior Court of Cook County are courts of concurrent and co-ordinate jurisdiction and that the chancellor of the superior court erred in appointing a receiver, as it appears from the allegations of the bill that the Circuit court had already appointed a receiver for the same premises. This contention is a meritorious one.

> "When a court of competent jurisdiction has appointed a receiver, who is in possession of and administering the property under its orders, another court of concurrent jurisdiction will not entertain a bill to sequestrate the same property, nor to take it from the possession of the former receiver, and to appoint its own receiver. In such a case, the proper procedure should rest rather in the court which is already in possession of the property through its receiver. * * * And the * * * to primarily is not to be found in the first acts i. e. mere possession of the res, but the court which first asserts exclusive control by reason of having taken cognizance of the subject-matter of the litigation is entitled to proceed with the

administration of the estate." (High on Receivers, 4th Ed., p. 70.)

"As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute." (Harkin v. Brundage, 276 U. S. 36, 43.)

"All the authorities sustain the proposition that, when a court of equity acquires jurisdiction of a cause, and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court appointing the receiver untrammeled in its administration of the same, as the law directs, regardless of whether the original appointment was or was not erroneous. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons, and has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. Nor is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, * * ". (23 Ruling Case Law, 66.)

"In the case of conflicting applications for the appointment of a receiver, the general rule is that the court which first takes cognizance of the controversy and thus obtains jurisdiction will retain it to the end of the litigation, and, incidentally, is entitled to take the possession or assume the control of the subject-matter of the controversy, to the exclusion of all interference from other courts of co-ordinate jurisdiction. One court, therefore, has no power to appoint a receiver for property where a receiver has already been appointed therefor by another court of competent jurisdiction, who has taken possession of the property involved; or rather, a subsequently appointed receiver will not be allowed in any manner to interfere with the rights or possession of the first. The question of precedence in such a case depends upon priority of appointment.

Another court of co-ordinate jurisdiction has no right to interfere with property in the hands of a receiver already appointed, nor to entertain complaint against such receiver, nor attempt to control or call him to account, or undertake to remove him." (23 Am. & Eng. Enc. of Law, 2d Ed., p. 1112.)

The bill does not allege that leave was ever granted the appellee by the Circuit Court of Cook County to sue the receiver, Penikoff, or to replace him as receiver, or to extend the receivership to the instant case, and for aught that appears in the bill, the appellee may have

administration of the estate." (High on Receivers, 4th Ed., p. 70.)

"As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill in equitable to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute." (Hopkins v. Stanchfield, 270 U. S. 76, 83.)

"All the authorities sustain the proposition that, when a court of equity acquires jurisdiction of a cause and appoints a receiver to take charge of the property involved, then no other court of co-ordinate jurisdiction has any power or authority to interfere or meddle with the property in the hands of the receiver, but must leave the court exercising the receiver mentioned in its exclusive of the same, as the law directs, regardless of whether the original appointment was or was not correct. This rule is essential to the orderly working of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons, and has no reference to the superiority of one tribunal over the other, but to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. Not is the rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court. * * " (23 Milliken v. Gates, 68.)

"In the case of conflicting appointments, the appointment of a receiver, the general rule is that the court which first takes possession of the subject-matter thus obtains jurisdiction will retain it to the end of the litigation, and, incidentally, is entitled to take the possession or assume the custody of the subject-matter of the controversy, to the exclusion of all interference from other courts of concurrent jurisdiction. The court, therefore, has no power to appoint a receiver for property where a receiver has already been appointed for it by another court of concurrent jurisdiction, who has taken possession of the property involved or retains, a subsequently appointed receiver will not be allowed in any manner to interfere with the rights or possession of the first, the question of precedence in such a case depends upon priority of appointment.

Another court of co-ordinate jurisdiction has no right to interfere with property in the hands of a receiver, "duly appointed, nor to entertain complaints against such receiver not attempt to control or call him to account, or by injunction to remove him." (23 Am. & Eng. Ency. of Law, 3d Ed.)

The bill does not allege that there was over [illegible] appointed by the Circuit Court of Cook County to sue the [illegible] "Trustee", or to replace him as receiver, or to extend the [illegible] to the instant case, and for aught that appears in the [illegible] may have

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been a party to the proceedings in the Circuit Court. The appeal attempts to defend the appointment of the receiver in the instant case upon the sole ground that the bill alleges that the mortgage in the Circuit Court proceedings is junior and subordinate to appellee's. No facts are alleged in the bill that sustain this contention and the allegation that the appellee's lien is superior is merely a conclusion of the pleader, but, in any event, under the authorities, it would make no difference in the determination of the instant contention that the lien of the appellee is superior to that of the complainant in the proceedings in the Circuit Court, and if the appellee's mortgage, as a matter of fact, is entitled to priority, he should have sought relief in the Circuit Court, which court was already in actual or constructive possession of the property through its receiver. The appellee, in defense of the instant appointment, has called our attention to several cases, but none of these is in point, as each involves merely the question of the power of a court to remove a receiver appointed by it at the application of one party and to then appoint a receiver at the application of another party. The Superior Court had no power to remove the receiver appointed by the Circuit Court, and there are now two receivers of the same property, and if the instant order is sustained we would have presented an unseemly conflict between courts of concurrent jurisdiction.

The appellant contends that it was reversible error to appoint the instant receiver without requiring the appellee to give a bond, unless it was set forth in the order that in the opinion of the court, upon notice and full hearing, the bond called for by the statute should be dispensed with, and that the order appointing the receiver is fatally defective in this regard. In the view that we have taken of the first contention it is unnecessary for us to consider the second.

The order of the Superior Court appointing George W. Story as receiver of the premises described in the bill of complaint is reversed. REVERSED.

Barnes, P.J., and Gridley, J., concur.

been a party to the proceedings in the Circuit Court. The appellant attempts to defend the appointment of the receiver in the instant case upon the sole ground that the bill alleges that the mortgage in the Circuit Court proceedings is junior and subordinate to appellee's. No facts are alleged in the bill that sustain this contention and the allegation that the appellee's lien is superior is merely a conclusion of the pleader. But, in any event, under the authorities, it would make no difference in the determination of the instant controversy that the lien of the appellee is superior to that of the complainant in the proceedings in the Circuit Court, and if the appellee's mortgage, as a matter of fact, is subject to priority, he should have equitable relief in the Circuit Court, which court was already in actual or constructive possession of the property through its receiver. The appellee, in equity of the instant appeal, has called our attention to several cases, but none of them is in point, as each involves merely the question of the power of a court to remove a receiver appointed by it at the application of one party and to place a receiver at the application of another party. The Superior Court had no power to remove the receiver appointed by the Circuit Court, and there are now two receivers of the same property, and if the instant order is sustained we would have presented an unseemly conflict between courts of concurrent jurisdiction.

The appellant contends that it was reversible error to appoint the instant receiver without requiring the appellee to give a bond, unless it was set forth in the order that in the opinion of the court, upon notice and full hearing, the bond called for by the statute should be dispensed with, and that the order, allowing the receiver in forthcoming defendants to sue in forma pauperis, must have taken of the first assertion as it merely by for us to consider the account.

The order of the Superior Court appointing a receiver, being an re-
ceiver of the premises described in the bill of complaint, is hereby
Reversed.

33389

FRIEDA GOESSELE, Appellant, v. FEDERAL LIFE INSURANCE COMPANY, a corporation, Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

Opinion filed Nov. 6, 1929

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This was an action brought upon a policy for accident insurance issued by the Federal Life Insurance Company, upon the life of George Goessele for $1,000, in which the plaintiff Frieda Goessele was named as beneficiary. The policy was issued March 9, 1925. George Goessele, named in said policy, came to his death May 15, 1927, by reason of injuries received in an accident occurring May 13, 1927. The policy of insurance, by its terms, expired March 8, 1926. The policy of insurance, among other things, contained the following:

> "By payment of a renewal registration fee of One Dollar ($1.00) in advance, this Policy may be renewed from year to year for further periods of one year. Thereupon a receipt signed by the Secretary of the Company shall be issued to the Insured, which receipt shall be the only evidence binding upon the Company of the payment of such renewal registration fee. In such event the Policy will be continued in force to the date specified in such renewal receipt. The Company will renew this Policy for at least one year; but thereafter this Policy may be renewed only with the consent of the Company."

The policy of insurance lapsed by its terms, as already stated, and on November 17, 1926, George Goessele paid to the defendant a renewal registration fee of one dollar and received the following receipt:

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PRICE GOODSELL,	ALBANY TERM
Appellant,	
v.	JAGUST 1928
FEDERAL LIFE INSURANCE COMPANY, a corporation,	DOCK 200K
Appellee.	

Opinion filed Nov. 6, 1928

Mr. PRESIDING JUSTICE WILLIAMS delivered the opinion of the court.

This was an action brought upon a policy for accident insurance issued by the Federal Life Insurance Company, upon the life of George Doessels for $1,000, in which the plaintiff Frieda Doessels was named as beneficiary. The policy was issued March 2, 1925. George Doessels, insured in said policy, died on his death May 15, 1927, by reason of injuries received in an accident occurring May 1?, 1927. The policy of insurance, by its terms, expired March 6, 1928. The policy of insurance, among other things, contained the following:

> "By payment of a renewal registration fee of one Dollar ($1.00) in advance, this policy may be renewed from year to year for further periods of one year. Thereupon a receipt signed by the secretary of the Company shall be issued to the insured, which receipt shall be the only evidence binding upon the insured of the payment of such renewal registration fee. In such event the policy will be continued in force to the date specified in such renewal receipt. The Company will renew this policy for at least one year; but thereafter this policy may be renewed only with the consent of the Company."

The policy of insurance issued by its terms, as already stated, and on November 17, 1926, George Doessels paid to the defendant a renewal registration fee of one dollar and received the following receipt:

"Premium Receipt

CHICAGO TRIBUNE TRAVEL ACCIDENT
INSURANCE POLICY
ISSUED BY THE FEDERAL LIFE INSURANCE COMPANY

Received One Dollar $1.00 in payment of renewal premium on Chicago Tribune Federal Life Insurance Company Travel Accident Policy.
Issued to George Goessele; Nov. 17, 1926; Federal Life Insurance Company.

W. E. Brunden
Secretary.

This payment has been recorded and is accepted subject to the conditions of the standard provisions of the policy."

Due notice of the death and the cause thereof was furnished to the defendant by the beneficiary, Frieda Goessele, plaintiff in this cause.

The only question involved is the interpretation of the clause in the policy and the receipt issued November 17, 1926.

It is contended on behalf of the defendant that the acceptance of the one dollar in payment of the renewal premium on November 17, 1926, continued and extended the policy for one year from and after the date of its expiration, by its terms, on November 8, 1925. It is contended on behalf of the plaintiff that the receipt, by its terms, extended the policy of insurance for one year from and after November 17, 1926, at which time it was paid and received by the company. The receipt does not specifically state that the policy should be continued in force until November 17, 1927, but the date on said receipt signifies that it was received and accepted as of that date. It is insisted that the legal effect is to extend the time of the original policy only for one year from its expiration.

Premium receipt

CHICAGO TRIBUNE TRAVEL COMPANY
INSURANCE POLICY
ISSUED BY THE PRUDEN L LIFE INSURANCE COMPANY

Received one dollar ($1.00) in payment of premium
premium on Chicago Tribune Federal Life Insurance
Company Travel Accident Policy.
Issued to George Cassels; Nov. 17, 1970; Federal
Life Insurance Company.
[illegible]
[illegible]
[illegible]

This document has been received and is retained subject
to the conditions of the attached proposition of the
policy.

The notice of the death and the cause thereof
furnished to the defendant by the beneficiary, which concerns
plaintiff in this case.

The only question involved is the interpretation of
the clause in the policy [illegible] "[illegible] December 17, 1970,
[illegible]

It is contended, in behalf of the defendant, that the
acceptance of the due notice of payment of the premium premium
on December 17, 1970, continued the extension of [illegible] for one
year from and after the date of the expiration, by its terms,
on November 8, 1970. It is contended on behalf of the insured
that that the receipt, by its terms, continued the policy of
insurance for one year from [illegible] December 17, 1970, at
which time it was [illegible] received by the company. The
receipt does not specifically [illegible] that the policy would be
continued in force until December 17, 1971, but [illegible] on
said receipt signifies that it was received [illegible]
at that date. It is insisted that the legal effect is to
extend the time of the original policy [illegible] one year
from its expiration.

If the contention of the plaintiff is correct, the accident happened within one year from the period of the acceptance of the receipt and if the contention of the defendant is correct, the accident happened over one year after the termination of the renewal of the policy from March 8, 1926. It is a well recognized rule of law that courts abhor forfeitures and will construe a policy liberally in favor of the insured. It becomes necessary, however, to consider the policy of insurance and its purpose, and it appears to be plain that the rights of the parties are, necessarily, fixed by the terms of their agreement.

The original insurance granted by the policy was for the period of one year, from March 9, 1925, until and including March 8, 1926, and any rights continuing the policy, must be based upon the agreement of the parties as contained in the policy. It is provided in the policy that it may be renewed from year to year for further periods of one year, and in our opinion, the payment of the premium was effective only for the purpose of continuing the policy for the period of one year from the date of its expiration. The receipt does not specifically agree to extend the time to any specific date, and the time stated in the receipt refers only to the date of the acceptance of the renewal premium. If the interpretation should be placed upon the policy and the receipt, as asked for by the plaintiff, there would be a hiatus between the time of the expiration of original policy and its renewal and it would not constitute a renewal of the policy, but the making of a new agreement for a period of time not contemplated by the policy. The expression used in the policy that it may be renewed from year to year for further periods of one year, should be interpreted to mean

If the contention of the plaintiff is correct, the accident happened within one year from the period of the acceptance of the receipt and if the contention of the defendant is correct, the accident happened over one year after the termination of the term of the policy from March 8, 1926.

It is a well recognized rule of law that courts abhor forfeitures and will construe a policy liberally in favor of the insured. It becomes necessary, however, to consider the policy of insurance and its purpose, and it appears to be plain that the rights of the parties are, necessarily, fixed by the terms of their agreement.

The original insurance granted by the policy was for the period of one year, from March 9, 1925, until and including March 8, 1926, and any rights continuing the policy, must be based upon the agreement of the parties as contained in the policy. It is provided in the policy that it may be renewed from year to year for further periods of one year, and in our opinion, the payment of the premium was effective only for the purpose of continuing the policy for the period of one year from the date of its expiration. The receipt does not specifically agree to extend the time to any specific date, and the time stated in the receipt refers only to the date of the acceptance of the renewal premium. If the interpretation should be placed upon the policy and the receipt, as asked for by the plaintiff, there would be a hiatus between the time of the expiration of original policy and its renewal and it would not constitute a renewal of the policy, but the making of a new agreement for a period of time not contemplated by the policy. The expression used in the policy that it may be renewed from year to year for further periods of one year, should be interpreted to mean

"renewed from year to year for periods of one year" from and after the date of the expiration of the policy.

In our interpretation of the policy and the receipt, the payment of the one dollar served only to continue the policy for the balance of the year following the expiration of the original contract of insurance and effected the keeping of the policy in force up to and including March 8, 1937.

For the reasons stated in this opinion the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

"renewed from year to year for periods of one year" from and after the date of the expiration of the policy.

In our interpretation of the policy and the receipt, the payment of the one dollar served only to continue the policy for the balance of the year following the expiration of the original contract of insurance and effected the keeping of the policy in force up to and including March 8, 1917.

For the reasons stated in this opinion the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYAN AND HOLDEN, JJ., CONCUR.

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255 I.A. 622[3]

FRIEDA GOESSELLE, (Plaintiff) Appellant, v. FEDERAL LIFE INSURANCE COMPANY, a Corporation, (Defendant) Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

Opinion filed Jan. 2, 1930

OPINION ON REHEARING.

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

After reconsideration of said cause, upon rehearing on petition and answer thereto, this court adheres to its original judgment entered in said cause in this court and the opinion heretofore filed is ordered to stand as the opinion in the cause.

RYNER AND HOLDOM, JJ. CONCUR.

STATE

FRIEDA GONDERMAN,

(Plaintiff) Appellant,

v.

FEDERAL LIFE INSURANCE COMPANY, a corporation,

(Defendant) Appellee.

APPEAL FROM

SINGNEY COUNTY,

COOK COUNTY.

Opinion filed Jan. 2, 1930

OPINION OF REHEARING.

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

After reconsideration of said cause, upon rehearing on petition and answer thereto, this court adheres to its original judgment entered in said cause in this court and the opinion heretofore filed is ordered to stand as the opinion in the cause.

KERNS AND HOLDOM, JJ., CONCUR.

33467 66 a 255 I.A. 622

ESTELLE K. WHITE,

(Complainant) Appellant,

v.

UNIVERSAL REAL ESTATE IMPROVEMENT CORPORATION, a Corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The complainant Estelle K. White filed her bill of complaint in the Circuit Court of Cook County against the defendant Universal Real Estate Improvement Corporation, a corporation. The defendant interposed its demurrer to said bill and the demurrer was confessed and leave granted complainant to file an amended bill. November 13, 1928, general and special demurrers filed by the defendant to an amended bill of complaint were sustained and complainant, electing to stand by her amended bill, it was dismissed for want of equity at complainant's costs. Complainant prayed and was allowed an appeal to this court.

The amended bill charges that the complainant on the first day of October, 1925, entered into a written contract with the defendant Universal Real Estate Improvement Corporation, under which plaintiff agreed to purchase a certain lot in Pater's Harborview Subdivision; charges further that at the time she was engaged in the business of selling merchandise at retail in a store in the City of Chicago, and while there and prior to the signing of the contract in question, she was solicited by the agents of the defendant for the purpose of

[illegible]

GEORGE X. WHITE,

(Complainant) Appellant,

v.

UNIVERSAL REAL ESTATE IMPROVEMENT CORPORATION, a Corporation,

Appellee.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The complainant George X. White filed his bill of complaint in the Circuit Court of Cook County against the defendant Universal Real Estate Improvement Corporation, a corporation. The defendant interposed its demurrer to said bill and the demurrer was considered and leave granted complainant to file an amended bill. November 17, 1928, general and special demurrers filed by the defendant to an amended bill of complaint were sustained and complainant, electing to stand on the amended bill, it was dismissed for want of equity at complainant's costs. Complainant prayed and was allowed an appeal to this court.

The amended bill charges that the complainant on the first day of October, 1928, entered into a written contract with the defendant Universal Real Estate Improvement Corporation, under which plaintiff agreed to purchase a certain lot in Slater's Metropolitan Subdivision; it goes further that at the time he was engaged in the business of selling merchandise at retail in a store in the city of Chicago, and while there and prior to the signing of the contract in question, he was solicited by the agents of the defendant for the purpose of

procuring her as a purchaser for the lot in question; charges that complainant had no knowledge, nor means of securing knowledge of real estate values in said subdivision, which was located in Chicago, except in so far as said values were told to her by the owners of said subdivision; charges that the defendant, by its agents, represented that lands in the vicinity of said subdivision, and more particularly the lands in the subdivision in question, were increasing in value and that lots in said subdivision were being re-sold by the purchasers thereof for large profits and that she would make money on her investment; charges that she relied upon said representations, went to the property owned by the defendant, in company with the agents, and there met other representatives of the defendant who made like statements; charges that the defendant, among other things, represented to complainant that the owners of the subdivision had adopted a comprehensive program for developments and improvements; that a number of bungalows would be under construction shortly; that a school building would be built; a church constructed; streets extended through and across said subdivision; that alleys were being laid out and sidewalks being built; that underground improvements were then being constructed; that special assessments had been levied, payable in the year 1926,and subsequent thereto, for the payment of improvements; that each and all of the improvements and developments, as represented, were part of the program to be completed on or before a certain time in the future; that advertisements were inserted in the newspapers which were read by the complainant and believed and relied upon by her; that each and all representations so made were false and were known to be false at the time and were made to deceive complainant for the purpose of inducing her buy the lot in question; that all of said representations were material and relied upon by complainant.

said representations were material and relied upon by complainant, the purpose of inducing her buy the lot in question; that all of said representations were false at the time and were made to deceive complainant for to be false at the time and were made to deceive complainant for each and all representations so made were false and were known by the complainant and believed and relied upon by her; that advertisements were inserted in the newspapers which were read complained on or before a certain time in the future; that and developments, as represented, were part of the program to be the payment of improvements; that each and all of the improvements levied, payable in the year 1930,and subsequent thereto, for then being constructed; that special assessments had been and sidewalks being built; that underground improvements were and across said subdivision; that alleys were being laid out would be built; a church constructed; streets extended through would be under construction shortly; that a school building for developments and improvements; that a number of bungalows the owners of the subdivision had adopted a comprehensive program defendant, among other things, represented to complainant that of the defendant who made like statements; charges that the in company with the agents, and there met other representatives representations, went to the property owned by the defendant, money on her investment; charges that she relied upon said purchasers thereof for large profits and that she would make and that lots in said subdivision were being re-sold by the lands in the subdivision in question, were increasing in value the vicinity of said subdivision, and more particularly the that the defendant, by its agents, represented that lands in

procuring her as a purchaser for the lot in question; charges that complainant had no knowledge, nor means of acquiring knowledge of real estate values in said subdivision, which was located in Chicago, except in so far as said values were told to her by the owners of said subdivision; charges that complainant, by its agents, represented that lands in the vicinity of said subdivision, and more particularly the and that lots in said subdivision were being re-sold by the purchasers thereof for large profits and that she would make money on her investment; charges that she relied upon said representations, went to the property owned by the defendant, in company with the agents, and there met other representatives of the defendant who made like statements; charges that the defendant, among other things, represented to complainant that the owners of the subdivision had adopted a comprehensive program for developments and improvements; that a number of bungalows would be under construction shortly; that a school building would be built; a church constructed; streets extended through and across said subdivision; that alleys were being laid out and sidewalks being built; that underground improvements were then being constructed; that special assessments had been levied, payable in the year 1930,and subsequent thereto, for the payment of improvements; that each and all of the improvements and developments, as represented, were part of the program to be completed on or before a certain time in the future; that advertisements were inserted in the newspapers which were read by the complainant and believed and relied upon by her; that

The amended bill further charges that, upon a signing of the agreement, plaintiff made her initial payment in cash and thereafter made payments from time to time until September 12, 1927; charges further that on to-wit the first day of April, 1926, she ascertained that said owners of said subdivision had not complied with the representations made, but that on the contrary, all of said lots in said subdivision were unimpproved and unoccupied; charges that she then endeavored to communicate with the agents of the owners of said subdivision in order to request them to cancel her contract, but that they avoided her and put her off from time to time and that on the 7th day of October, 1927, she filed her suit; charges that by reason of said misrepresentations she has sustained damages, in that said property has not increased in value, and asks that the contract may be declared invalid and void and an accounting taken as to the amount paid by said complainant under said agreement and that she might have such other and further relief as equity might require.

The contract contained a provision stating that it was for the sale of vacant property only and the vendor became in no manner obligated to resell for the benefit of the purchaser. The contract also contained a provision stating that the purchaser had read and understood the contract and agreed that no representations, promises or agreement not expressed therein had been made for the purpose of inducing the purchaser to enter into and execute it.

A reading of the bill of complaint shows that the allegations as to the time in which the work, as represented, was to be completed was within a period of six months after the date of the making of the agreement. An examination of the record of payments shows that the complainant continued to make

The amended bill further observes that, upon a signing of the agreement, plaintiff made her initial payment in cash and thereafter made payments from time to time until September 14, 1927; charges further that on towards the first day of April, 1926, she ascertained that said owners of said subdivision had not complied with the representations made, but that on the contrary, all of said lots in said subdivision were unimproved and uncomplied; charges that she then endeavored to communicate with the agents of the owners of said subdivision in order to request them to cancel her contract, but that they avoided her and put her off from time to time and that on the 7th day of October, 1927, she filed her suit; charges that by reason of said misrepresentations she had sustained damages, in that said property has not increased in value, and asks that the contract may be declared invalid and void and an accounting taken as to the amount paid by said complainant under said agreement and that she might have such other and further relief as equity might require.

The contract contained a provision stating that it was for the sale of vacant property only and the vendor became in no manner obligated to resell for the benefit of the purchaser. The contract also contained a provision stating that the purchaser had read and understood the contract and agreed that no representation, promises or agreements not expressed therein had been made for the purpose of inducing the purchaser to enter into and execute it.

A reading of the bill of complaint shows that the allegations as to the time in which the note, as it recited, was to be completed was within a period of six months after the date of the making of the agreement. An examination of the record of payments shows that the complainant continued to make

payments on the property for a period of two years, after it came to her knowledge that the improvements were not undertaken.

It becomes the duty of one asking for a rescission of a contract on the ground that it was obtained by fraud, to rescind at the earliest opportunity. A vendee purchasing real estate can not wait for a period of two years before asking for rescission of a contract on the ground that it had been obtained by fraud.

The bill does not contain sufficient allegations of fact, from which it can be claimed that the delay was without fault on the part of the vendee. She had no right to speculate upon the probability of an increase in value for the length of time shown on the face of the bill.

See Muiller v. Ryan, 306 Ill. 88, wherein the court says:

> "It is equally necessary that a party to a contract desiring to rescind it for fraud must make his election to do so promptly after learning of the fraud. He must announce his purpose and adhere to it. (Greenwood v. Fenn, 136 Ill. 146; Hansen v. Gavin, supra.) This conveyance was made on July 19, 1920, and the bill was filed more than eighteen months later, to the May term, 1922, of the court."

It does not appear that the complainant relied upon the representations of the agents of the defendant. It is alleged in the bill that plaintiff went to the property in question, and was able to see the conditions surrounding the subdivision and ascertain what, if anything in the way of improvements, was being done upon the property. The Supreme Court in this State in the case of Johnson v. Miller, 299 Ill. 276, in its opinion says:

> "Appellant did not depend, as we have said, on representations of Miller but visited and examined the land. Quite a period of time before the deeds

payments on the property for a period of two years, after it came to her knowledge that the improvements were not undertaken.

It becomes the duty of one asking for a rescission of a contract on the ground that it was obtained by fraud, to rescind at the earliest opportunity. A vendee overpaying real estate can not wait for a period of two years before asking for rescission of a contract on the ground that it had been obtained by fraud.

The bill does not contain sufficient allegations of fact, from which it can be claimed that the delay was without fault on the part of the vendee. She had no right to speculate upon the possibility of an increase in value for the length of time shown on the face of the bill.

See Mullins v. Ryan, 308 Ill. 89, wherein the court says:

> "It is certainly necessary that a party to a contract desiring to rescind it for fraud must exercise diligence to do so promptly after learning of the fraud. He must announce his purpose and adhere to it. (Strawbridge v. Ames, 138 Ill. 148; Hansen v. Martin, supra.) The conveyance was made on July 16, 1890, and the bill was filed more than eighteen months later, to the May term, 1892, of the court."

It does not appear that the complainant relied upon the representations of the agents of the defendant. It is alleged in the bill that plaintiff went to the property in question, and was able to see the conditions surrounding the subdivision and ascertain what, if anything in the way of improvements, was being done upon the property. The Supreme Court in this State in the case of Johnson v. Miller, 147 Ill. 376, in its opinion says:

> "Appellant did not deceive, as he here avers, by representations of Miller but visited and examined the land. Quite a period of time before the deed

were exchanged he had the opportunity to ascertain the character and value of the land and the truth of any statements or representations on that subject, if any such had been made. It seems clear from the testimony that he was not defrauded or misled by false representations made by anyone as to the value of the land. He had the opportunity by his visit to the farm to ascertain and determine its value, and it was his duty to make use of such opportunity. The law charges him with knowledge he might have obtained by making use of the means afforded him. Where no deceit has been practiced which ordinary prudence could not detect, the law will not assist a man capable of taking care of his own interests because he makes a bad or losing bargain. It is only in cases where the parties have not equal knowledge or means of knowledge as to the value of a property that equity will afford relief on the ground of fraud and misrepresentations. Representations as to value of property, though exaggerated, do not ordinarily afford ground for setting aside a contract, and are never made the basis for relief where the party claiming to have been deceived had ample opportunity to know of the truth or the falsity of the representations. If they are made with the intention of procuring them to be acted upon without investigating their correctness, and a party does so rely on them and act, equity may afford relief."

Complainant had no right to rely upon the representations that special assessments had been levied for the purpose of paying for the improvements to be made in said subdivision. This fact was easily ascertainable from an examination of the records of Cook County, in which county the property was situated and in which county complainant resided. Morel v. Masalski, 333 Ill.41.

Counsel for defendant rely upon the fact that underground improvements were being made and, in their brief, state that it was so represented to complainant that such underground improvements, namely, water, electric light, and telephone cables were all in. The bill, however, does not charge such fact in this language, but charges that the underground improvements were then being constructed in and through said subdivision and would be completed within six months from that date. If, as a matter of fact, they were then being constructed, complainant while upon the premises could have investigaged and ascertained the truth or

were acknowledged he had the opportunity to ascertain the character and value of the land and the truth of any statements or representations on that subject, if any such had been made. It seems clear from the testimony that he was not deceived or misled by false representations made by anyone as to the value of the land. He had the opportunity by his visit to the farm to ascertain and determine its value, and it was his duty to make use of such opportunity. The law charges him with knowledge he might have obtained by making use of the means afforded him. There no doubt has been practiced which certainly prudence could not detect, the law will not assist a man capable of taking care of his own interests because he makes a bad or losing bargain. It is only in cases where the parties have not equal knowledge or means of knowledge as to the value of a property that equity will afford relief on the ground of fraud and misrepresentations. Representations as to value of property, though exaggerated, do not ordinarily afford ground for setting aside a contract, and are never made the basis for relief where the party claiming to have been deceived had ample opportunity to know of the truth or the falsity of the representations. If they are made with the intention of preventing them to be acted upon without investigating their correctness, and a party does so rely on them and act, equity may afford relief."

Complainant had no right to rely upon the representations that special assessments had been levied for the purpose of paying for the improvements to be made in said subdivision. This fact was readily ascertainable from an examination of the records of Cook County, in which county the property was situated and in which county complainant resided. Kozul v. Yanelani, 40 Ill.App.

Damages for defendant's only upon the fact that underground improvements were being made and, in fact built, with the that it was so represented to complainant that such underground improvements, namely, water, electric light, and telephone cables were all in. The bill, however, does not charge such fact in this language, but charges that the underground improvements were then being constructed in and through said subdivision and would be completed within six months from that date. If, as a matter of fact, they were then being constructed, complainant could have ascertained the truth or the previous could have investigated and ascertained the truth or

falsity of this representation. Almost without exception, the representations alleged by the bill of complaint to have been made, were as to things that were to be done in the future, and not as to material existing facts. Day v. Fort Scott Investment Co. 153 Ill. 293. The parties dealt at arm's length, and there was no fiduciary relationship existing on the part of the vendor toward the vendee. The rule of caveat emptor applies to the purchase of real estate, as well as to any other commodity where the parties deal at arm's length. Van Gundy v. Steele, 261 Ill. 206.

The contract in question was not a void contract, but voidable, and it became the duty of the vendee to repudiate and ask for a rescission promptly after discovering the fraud. The vendee in the present case, by her action in continuing payment for two years after the discovery of the alleged fraud, is not in a position to ask for the interposition of a court of equity. It became her duty to elect promptly, either to abide by the contract, or to ask for a rescission. Naugle v. Yerkes, 187 Ill. 358; Brown v. Brown, 142 Ill. 409.

From a reading of the bill, we are of the opinion that it failed to state on its face a cause of action and is demurrable.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

falsity of this representation. Almost without exception, the representations alleged by the bill of complaint to have been made, were as to things that were to be done in the future, and not as to material existing facts. See v. Fort Pierce Investment Co., 158 Fl. 898. The parties dealt at arm's length, and there was no fiduciary relationship existing on the part of the vendor toward the vendee. The rule of caveat emptor applies to the purchase of real estate, as well as to any other commodity where the parties deal at arm's length. Van Gundy v. Strain, 281 Fl. 608.

The contract in question was not a void contract, but voidable, and it became the duty of the vendee to repudiate and sue for a rescission promptly after discovering the fraud. The vendee in the present case, by her action in continuing payment for two years after the discovery of the alleged fraud, is not in a position to ask for the interposition of a court of equity. It became her duty to elect promptly, either to abide by the contract, or to sue for a rescission. Hardie v. Hatten, 147 Fl. 380; Hagen v. Hagen, 14 Fl. 498.

From a reading of the bill, as a whole, it does not appear that it failed to state a cause of action and is demurrable.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGE AFFIRMED.

ATWELL, J. DEAN, JJ., CONCUR.

33476

NELLIE CORRIGAN AND MARTIN CORRIGAN,

Appellees,

v.

EDWARD L. ENGLAND, et al,

Defendants.

On Appeal of EDWARD L. ENGLAND,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiffs, Nellie Corrigan and Martin Corrigan, brought their action in the Municipal Court of Chicago against Edward L. England and Bruce S. Barney, for damages sustained by reason of a breach of contract dated July 15, 1924, the contract in question being for the purchase of a certain piece of real estate located at Willow Springs, Illinois. The defendant, England, filed his affidavit of merits in which he denied that he was a partner of the said Barney, but alleged that he had employed the said Barney under a written contract to secure purchasers for property located at Willow Springs, Illinois; that if the terms were satisfactory he would personally enter into a contract for the sale; denied that he had received any money from the plaintiffs and that the plaintiffs had failed to pay the real estate taxes on the property involved during the years 1924, 1925, 1926 and 1927.

The cause was tried before the court without a jury, resulting in a finding by the court in favor of the plaintiffs and against the defendants, and assessing plaintiffs' damages at the sum of $165.00 and judgment upon the finding.

35470

BELLIS COMMERCIAL AND BANKING
CORPORATION,

Appellees,

v.

EDWARD L. BAGLAND, et al,

Defendants.

On Appeal of EDWARD L. [illegible],

Appellant.

Opinion filed Jan. 3, 1930

Mr. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The plaintiffs, Bellis Commercial and Banking Corporation, brought their action in the municipal court of Chicago against Edward L. Bagland and Hugo A. Berge, for damages sustained by reason of a breach of contract and duty by the defendants, the contract in question being for a lease of certain place of real estate located at [illegible] Illinois. The defendant, Bagland, filed his affidavit of merits in which he denied that he was a partner of the said Berge, but admitted that he had employed the said Berge under a written contract to secure premises for necessary licenses to allow [illegible] Illinois; that if the [illegible] satisfactory to [illegible] ally enter into a contract for [illegible] received any money from the plaintiffs, and that the plaintiffs had failed to pay the real estate taxes on the property leased during the years 1926, 1927, 1928 and 1929.

The cause was tried before the court without a jury, resulting in a finding by the court in favor of the plaintiffs and against the defendants, and assessing the first [illegible] at the sum of $1869.00 and judgment upon the finding.

The defendants in September, 1923, entered into articles of partnership for the purpose of carrying on a business of buying, selling, renting and managing real estate under the firm name of Bruce B. Barney & Company. The facts show that an account was opened by the partnership with the National Bank of the Republic in the name of Bruce B. Barney & Company. Offices were maintained at 29 South La Salle Street, and the name of the partnership was upon the door of the office where the business was carried on.

Defendant testified that shortly after the formation of the partnership he had a talk with Barney in which he declared that the partnership was ended. The partnership agreement itself provided that either partner would have the right to dissolve the partnership by giving thirty (30) days notice in writing. There does not appear to have been any written notice given. Barney testified that there was no conversation between himself and England in which England stated that the partnership was to be terminated.

A contract for the sale of a piece of real estate owned by England at Willow Springs was entered into between the Corrigans and Edward England by Bruce B. Barney, his attorney in fact. The original payment of $50.00 was made July 15, 1924, and $10.00 every month thereafter until June 11, 1925, except March 10th, 1925, when $15.00 was paid. During this period of time the total sum of $165.00 had been paid.

Nellie Corrigan testified that she called upon the defendant, England, at his place of business in July, 1925, and asked England if he would take the payment due because she could not find Mr. Barney, and was told by England that he had nothing to do with the contract.

The defendants in September, 1[illegible], entered into articles of partnership for the purpose of carrying on a business of buying, selling, renting and managing real estate under the firm name of Grace R. Barney & Company. The facts show that an account was opened by the partnership with the Rockwell Bank of the Republic in the name of Grace R. Barney & Company. Offices were maintained at 70 South [illegible] Street, and the name of the partnership was upon the door of the office where the business was carried on.

Defendant testified that shortly after the formation of the partnership he had a talk with Barney in which he decided that the partnership was ended. The partnership agreement itself provided that either partner could have the right to dissolve the partnership by giving thirty (30) days notice in writing. There does not appear to have been any written notice given. Barney testified that there was no conversation between himself and Ingland in which Ingland stated that the partnership was to be terminated.

A contract for the sale of a piece of real estate owned by Ingland at [illegible] was entered into between the [illegible] and [illegible] by which [illegible], Barney, was authorized in fact. The [illegible] a period of [illegible] months thereafter until June 21, July 18, 1924, and $10,00 every month thereafter until June 21, 1928, except March 17th, 1925, when $[illegible] was paid. During this period of time the total sum of $[illegible] was paid.

Relate foreign testifies that she called upon the defendant, Ingland, at his place of business in July, 1[illegible], and asked Ingland if he would lend her the original deed because she could not find it. Barney, and she talk by Ingland that he had nothing to do with the contract.

It is insisted on behalf of the defendant, that there was no proof showing that Barney was authorized in writing to sign the contract in question on behalf of the defendant, England; that the finding of the trial court was not supported by the evidence; that the finding and judgment is against the manifest weight of the evidence.

The amount of the finding and judgment appears to be the exact amount of money paid in by the plaintiffs as installments on the purchase price of the property in question. The partnership arrangement between the defendants, if in full force and effect when these payments were made, was sufficient for the purpose of showing that the money had been received by the partnership and, if so received, Barney and England, would be liable as partners for money had and received. This is particularly true upon the refusal to accept further payments under the terms of the agreement.

While the statement of claim appears to be for damages sustained by reason of the breach of contract, it is apparent that substantial justice has been done by the judgment of the trial court if the money was, in fact, received by the partnership. The question as to whether or not the partnership was dissolved prior to the acceptance of the payments, was one of fact for the court. If, as a matter of fact, England entered into a partnership agreement and placed Barney in a position where he could accept payments of money in and about the partnership business, England should be required to suffer the consequences rather than a person dealing with Barney, believing that Barney had such right and authority.

The court saw and heard the witnesses, and his finding will not be disturbed unless against the manifest weight of the

It is in dispute on behalf of the defendant, that there was no proof showing that money was authorised in writing to alter the contract in question on behalf of the defendant; Anyiam; that the finding of the trial court was not supported by the evidence; that the finding and judgment is against the manifest weight of the evidence.

The amount of the finding and judgment appears to be the exact amount of money paid in by the plaintiffs in instalments on the production of the property in question. The petitioners contended before the court, i.e. in full force and effect when these payments were made, was sufficient for the purpose of showing that the money had been received by the respondent and, if so received, money as tainted, could be liable as petitions for money had and received. This is particularly true upon the failure to honour further payments under the terms of the agreement.

While the evidence of claim appears to be for damages sustained by reason of the breach of contract, it is apparent that substantial justice was done by the judgment of the trial court if the money was, in fact, received by the defendant. The question as to whether or not the payments are liquidated relate to the consideration of the payments, and are of that particular court. If, as a matter of fact, payment received into a contractually prescribed account in a position where it could accept payments of money in and about the plaintiff's business, payment should be returned to neither the correspondence rather than person dealing with money, knowing that money had authority and authority.

The court has not heard the witnesses, [illegible] will not be disturbed unless [illegible] the contract [illegible]

evidence, and we are not inclined to say that it was after a reading of the testimony in the case.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

33485

CHRISTINA PEARSON,
Appellee,

v.

RIDGEWOOD CEMETERY COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

255 I.A. 623

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff Christina Pearson in her statement of claim, filed in the Municipal court October 4, 1928, charged that on April 25, 1924, she entered into a certain contract in writing with the defendant for the purchase by her of two cemetery lots from the defendant, Ridgewood Cemetery Company, for the sum of $1,000.00. The contract was in writing and contained the following provision:

> "These lots are sold with the guarantee they will double in value in twenty-four months or this contract is null and void and all moneys refunded."

Charges further that plaintiff complied with all the terms and provisions of the contract, including the payment to the defendant of the purchase price; charges further that the said lots did not double in value in accordance with the guarantee made by the defendant and its agents; charges further that she has demanded a refund of the money paid by her under the contract, which has been refused.

The affidavit of merits filed in defense, charges that the plaintiff accepted a deed to the property and did

33488

GERALDINA FERNOCK,

Appellee,

v.

RIDGEWOOD CEMETERY COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 8, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Plaintiff Geraldina Fernock in her statement of claim, filed in the municipal court October 4, 1928, charged that on April 26, 1924, she entered into a certain contract in writing with the defendant for the purchase by her of two cemetery lots from the defendant, Ridgewood Cemetery Company, for the sum of $1,000.00. The contract was in writing and contained the following provision:

> "These lots are sold with the guarantee they will double in value in twenty-four months or this contract is null and void and all moneys refunded."

Charges further that plaintiff complied with all the terms and provisions of the contract, including the payment to the defendant of the purchase price; certain further that the said lots do not double in value in accordance with the guarantee made by the defendant and its agents; alleges further that she has demanded a refund of the money paid for her under the contract, which has been refused.

The affidavit of merits filed in defense, averred that the plaintiff accepted a deed to the property and did

not, prior to the commencement of the suit, make any tender to the defendant of the deed or other reconveyance of said lot; charges further that within twenty-four months after the date of the contract that the said lots did, in fact, double in value.

The cause came on for hearing before the court without a jury and a finding was entered in favor of the plaintiff, assessing her damages at the sum of $2,200.00, and judgment was entered upon the finding. From this judgment this appeal is taken.

From the testimony it appears that the plaintiff paid the sum of $1,000.00 in full for the lots in question, as provided for in the contract. The last and final installment was made in January, 1926, which was less than two years after the making of the contract.

It is insisted on behalf of the defendant that, by accepting her deed in full, she waived any rights under the contract. Defendant argues that, in order that plaintiff might be able to maintain an action under the contract, she should allege and prove rescission and notice to defendant within a reasonable time after the cause of rescission arose and became known to the plaintiff. With this we cannot agree. Moreover, plaintiff on July 5, 1928, offered to return to the defendant the lots in question together with the deeds and contracts appertaining thereto, which was refused. She could do no more.

After having made her final payment on her contract, she was entitled, under the terms of the agreement, to wait until the expiration of the twenty-four months. And, in fact, an election by her to rescind before that time would have been premature. Moreover, she was not required to resort to equity in order to exercise any right of rescission, but was entitled

not, prior to the commencement of the suit, make any tender to the defendant of the deed or other conveyance of said lot; charges further that within twenty-four months after the date of the contract that the said lots did, in fact, double in value.

The case came on for hearing before the court without a jury and a finding was entered in favor of the plaintiff, assessing her damages at the sum of $2,800.00, and judgment was entered upon the finding. From this judgment this appeal is taken.

From the testimony it appears that the plaintiff paid the sum of $1,000.00 in full for the lots in question, as provided for in the contract. The last and final instalment was made in January, 1888, which was less than two years after the making of the contract.

It is insisted

by accepting her deed in full, she waives any rights under the contract. Defendant argues that, in order that plaintiff might be able to maintain an action under the contract, she should allege and prove rescission and notice to defendant within a reasonable time after the cause of rescission arose and become known to the plaintiff. With this we cannot agree. Moreover, plaintiff on July 5, 1888, offered to return to the defendant the lots in question together with the deeds and concrete apportenance thereto, which was refused. We could do no more.

After paying made her final payment on the contract, she was entitled, under the terms of the contract, to wait until the expiration of the twenty-four months, and, in fact, an election by her to rescind before that time would have been premature. Moreover, she was not required to resort to equity in order to exercise her right of rescission, but was entitled

to maintain an action at law on the contract for breach of guaranty. Having a right to an action at law, she could bring her action at any time within the statutory period of limitations.

There was some evidence in the record, as shown by her testimony, from which the court could conclude that the lots in question had not doubled in value and, as it was a trial before the court without a jury, every intendment should be indulged in favor of the finding. The judgment entered in the cause, however, based on the finding of the court, appears to have been on the theory that she was entitled to twice the amount of the sum paid for the lots.

From a reading of the guarantee, it appears that she would be entitled only to the return of her money, together with such interest as may have accrued thereon from the date of the final payment until the entry of judgment. The statement of claim filed in the cause charges that the defendant refused to refund the money paid by plaintiff and there is nothing contained in said statement demanding more than that amount in damages.

A proper judgment in said cause would be for $1,145.00, same being for principal and interest at the rate of five per cent to date. The judgment of the Municipal Court is reversed and judgment entered here for the plaintiff for $1,145.00.

JUDGMENT REVERSED AND
JUDGMENT HERE FOR $1,145.00.

RYNER AND HOLDOM, JJ. CONCUR.

to maintain an action at law on the contract for breach of guaranty. Having a right to an action at law, she could bring her action at any time within the statutory period of limitations.

There was some evidence in the record, as shown by her testimony, from which the court could conclude that the loss in question had not doubled in value and, as it was a trial before the court without a jury, every intendment should be indulged in favor of the finding. The judgment entered in the cause, however, based on the finding of the court, appears to have been on the theory that she was entitled to twice the amount of the sum paid for the loss.

From a reading of the guaranty, it appears that she would be entitled only to the return of her money, together with such interest as may have accrued thereon from the date of the first payment until the entry of judgment. The statement of claim filed in the cause shows that the defendant refused to refund the money paid by plaintiff and there is nothing contained in said statement indicating more than that amount in damages.

A proper judgment in this cause would be for $1,140.00, as a being for principal and interest at the rate of five per cent to date. The judgment of the Municipal Court is reversed and judgment entered here for the plaintiff for $1,140.00.

JUDGE BY MACKENZIE, J.
JUDGMENT REVERSED FOR $1,140.00.

BYRNES AND GOLDEN, JJ. CONCUR.

33502

PEOPLE OF THE STATE OF ILLINOIS, (Plaintiff) Defendant in Error, v. PAUL STITNIKY, (Defendant) Plaintiff in Error.	)	ERROR TO MUNICIPAL COURT, OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The defendant Paul Stitniky was arrested and tried on a charge of driving an automobile on a public highway in the City of Chicago while drunk or intoxicated, in violation of the Illinois Motor Vehicle Act. The cause was tried before the court without a jury, resulting in a finding of guilty, as charged. Judgment was entered on the finding and the defendant sentenced to thirty days in the House of Correction and to pay a fine of $50.00 and costs. From this judgment a writ of error was presented to this court.

From the evidence it appears that about seven o'clock in the evening of February 14, 1928, one Mary Winker and her husband, were driving a Ford car north along Wentworth avenue on the east side of the street; that the defendant was driving a Nash car south on Wentworth avenue which collided with the Ford car; that after striking the car in which the complaining witness was riding, defendant's car swerved to the east ran over a sidewalk and ran through the front of and almost entirely within a bakery located on Wentworth avenue.

The only question urged for reversal is that the judgment is not supported by the evidence.

The complaining witness testified that she saw the

33502

PEOPLE OF THE STATE OF ILLINOIS, (Plaintiff) Defendant in Error, v. PAUL SITZNIAK, (Defendant) Plaintiff in Error.	ERROR TO MUNICIPAL COURT, OF CHICAGO.

Opinion filed Jan. 8, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The defendant Paul Sitzniak was arrested and tried on a charge of driving an automobile on a public highway in the City of Chicago while drunk or intoxicated, in violation of the Illinois Motor Vehicle Act. The cause was tried before the court without a jury, resulting in a finding of guilty, as charged. Judgment was entered on the finding and the defendant sentenced to thirty days in the house of correction and to pay a fine of $50.00 and costs. From this judgment a writ of error was prosecuted to this court.

From the evidence it appears that about seven o'clock in the evening of February 16, 1929, one Mary Tabor and her husband, were driving a Ford car north along Southwith avenue on the east side of the street; that the defendant was driving a Mack car south on Southwith avenue which collided with the Ford car; that after striking the car in which the complaining witness was riding, defendant's car swerved to the west ran over a sidewalk and ran through the front of and almost completely wrecked a bakery located on Southwith avenue.

The only question urged for reversal is that the judgment is not supported by the evidence.

The complaining witness testified that she saw the

car of the defendant coming from the north along Wentworth avenue and that it was zigzaging from one side to the other; that it ran over on to the east side of the street upon which they (the complaining witness and her husband) were driving; that, in her opinion, defendant's car was proceeding at a rate of from 40 to 45 miles an hour.

Six witnesses testified that the defendant was drunk at the time of the accident; that they could smell liquor upon his breath and that his manner and conduct indicated a condition of intoxication.

The defendant denied that he was intoxicated, and in this he was supported by his brother-in-law, who was present at the time. Three other witnesses testified as to his previous good habits as to sobriety.

The trial court had an opportunity of seeing and hearing the witnesses and observing their demeanor while upon the witness stand. Under the circumstances, we are not inclined to interfere with his finding and judgment. The same effect is given to the finding of a court as would be given to the verdict of a jury. This court will not set aside a verdict unless it is clearly apparent from the record that there was a reasonable doubt of the defendant's guilt. The People v. Nowicki, 330 Ill. 381. There is ample evidence in the testimony from which the court could have arrived at its judgment and we see no reason to disturb it.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

car of the defendant coming from the north along Lakewood avenue and that it was zigzagging from one side to the other; that it ran over on to the east side of the street upon which they (the complaining witness and her husband) were driving; that, in her opinion, defendant's car was proceeding at a rate of from 40 to 45 miles an hour.

Six witnesses testified that the defendant was drunk at the time of the accident; that they could smell liquor upon his breath and that his manner and conduct indicated a condition of intoxication.

The defendant denied that he was intoxicated, and in this he was supported by his brother-in-law, who was present at the time. Three other witnesses testified as to his previous good habits as to sobriety.

The trial court had an opportunity of seeing and hearing the witnesses and observing their demeanor while upon the witness stand. Under the circumstances, we are not inclined to interfere with his finding and judgment. The same effect is given to the finding of a court as would be given to the verdict of a jury. This court will not set aside a verdict unless it is clearly apparent from the record that there was a reasonable doubt of the defendant's guilt. The People v. Jordan, 270 Ill. 381. There is ample evidence in the testimony from which the court could have arrived at its judgment and we see no reason to disturb it.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

KERNE AND MORRISON, JJ., CONCUR.

33549

AUBURN CHICAGO COMPANY,

Appellee,

v.

MERCHANTS & MANUFACTURERS SECURITIES COMPANY, a Corp.

Appellant.

APPEAL FROM

25[illegible]23

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

The facts involved in this appeal were stipulated by counsel. The jury was waived and the cause was submitted to the trial court. Judgment was entered in favor of the plaintiff.

From the facts it appears that the Auburn Chicago Company, plaintiff, sold to C. R. Schuster, doing business as the Clark Motor Sales Company, two Auburn automobiles receiving in apayment two checks signed by Schuster, totaling the sum of $2,634.19. These checks were deposited by plaintiff in its bank and were later returned on account of insufficient funds. In the meantime the defendant, Merchants & Manufacturers Securities Company, a corporation, through its manager, examined the automobiles while upon the showroom floor of Schuster and paid him the sum of $2,518.00, and received in exchange two chattel mortgage notes and two chattel mortgages covering the machines in question. Thereafter Schuster absconded and the defendant, in accordance with the terms of its mortgages, repossessed itself of said automobiles in a replevin suit. Thereafter the defendant brought this suit in trover to recover the value of the cars.

plaintiff

33542

AUBURN CHICAGO COMPANY, appellee,	APPEAL FROM
v.	[illegible]
MERCHANTS & MANUFACTURERS SECURITIES COMPANY, a corp. appellant.	[illegible] COUNTY.
	[illegible] COURT.

Opinion filed Jan. 8, 1930

MR. PRESIDING JUSTICE BILECK delivered the opinion of the court.

The issues involved in this appeal were stipulated by counsel. The jury was waived and the cause was submitted to the trial court. Judgment was entered in favor of the plaintiff.

Upon the facts it appears that the Auburn Chicago Company, plaintiff, sold to J. S. Schweter, doing business as the Clark Motor Sales Company, two automobiles receiving in payment two checks signed by Schweter, totaling the sum of $3,834.19. These checks were deposited by plaintiff in the bank and were later returned on account of insufficient funds. In the meantime the defendant, Merchants & Manufacturers Securities Company, a corporation, through its manager, examined the automobiles while upon the showroom floor of Schweter and paid him the sum of $3,818.75, not received in exchange two chattel mortgage notes and two chattel mortgages covering the machines in question. Thereafter Schweter absconded and the defendant, in accordance with the terms of its mortgages, repossessed itself of said automobiles in a replevin suit. Thereafter the defendant brought this suit in trover to recover the value of the cars.

There is but one question involved in the proceeding and that is whether or not the Auburn Chicago Company, the seller, had the right to reclaim the property in the hands of an innocent third party, where the payment had been made by checks, which were subsequently dishonored, on the theory that the dishonored checks were only a conditional payment and that title had not passed.

We are also asked to dismiss the appeal on the ground that the bill of exceptions filed herein does not contain a certificate of the trial judge that it contained all the evidence heard upon the trial.

At the end of the testimony there is a statement by the court reporter that this was all of the evidence in the case, both on the part of the plaintiff and the defendant. Following this statement appears the words, "Approved this April 12, 1929. Walter P. Steffen, Judge." This is not the way in which a certification should be made, but it has been recognized as sufficient by the Supreme Court of this state in the case of Grand Lodge A. O. U. W. v. Ehlman, 246 Ill. 555. The court in its opinion, says:

> "This certificate is informal, but in approving and signing the statement and certificate that the evidence was heard in the cause and was all the evidence offered, the judge did everything that was essential to preserve the evidence as a part of the record."

The same situation as appears in the case cited, appears also in the case at bar.

As a general proposition it may be said with reference to the main point involved that, where a sale of personal property is made, by reason of false representations of the purchaser, or where a sale is made and the purchaser has no

There is but one question involved in the proceeding and that is whether or not the Auburn Chicago Company, the seller, had the right to rescind the property in the hands of an innocent third party, where the payment had been made by checks, which were subsequently dishonored, on the theory that the dishonored checks were only a conditional payment and that title had not passed.

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The same situation as appears in the case cited, appears also in the case at bar.

As a general proposition it may be said with reference to the main point involved that, where a sale of personal property is made, by reason of false representations of the purchaser, or where a sale is made and the purchaser has no

intention of paying for the same, the same is voidable, and not void, and an innocent purchaser for value acquires good title. Reid, Murdock & Co. v. Sheffy, 99 Ill. App. 189; Stock Yard Co. v. Mallory, etc. Co., 157 Ill. 554; Young, et al. v. Bradley, et al, 68 Ill. 553.

Without doubt, where goods are purchased fraudulently with no intention to pay for same, the seller has the right to retake, providing no intervening rights have attached. This is true both under the common law and the Uniform Sales Act.

Chapter 121a, Para. 37, sec. 24, Cahill's Illinois Revised Statutes, provides as follows:

> "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

Paragraph 56, Section 53, of the same Act, providing for remedies of an unpaid seller, applies to the rights of the parties as between themselves. This section gives the seller the fight to retake and to have a lien under the conditions enumerated in said section, but it does not contemplate a situation where the rights of a bona fide purchaser for value have intervened. Neither do we consider this a conditional sale within the meaning of the Uniform Sales Act, as there was no contractual arrangement between the parties that it was to be such, nor does it come within the classification enumerated.

So far as this record discloses, this was not the first sale of the plaintiff to Schuster, but it appears that they had had several transactions prior to the action in question.

intention of paying for the same, the same is voidable, and not void, and an innocent purchaser for value acquires good title. Reid, Murdoch & Co. v. Shelly, 88 Ill. App. 188; Wisch Yard Co. v. Mallory, etc. Co., 187 Ill. 564; Young, et al. v. Bradley, et al. 88 Ill. 548.

"Without doubt, where goods are purchased fraudulently with no intention to pay for same, the seller has the right to retake, providing no intervening rights have attached. This is true both under the common law and the Uniform Sales Act.

Chapter 121½, Sec. 27, par. 24, Smith's Illinois Revised Statutes, provides as follows:

> "Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

Paragraph 38, Section 38, of the same Act, providing for rescission of an unpaid seller, applies to the rights of the parties as between themselves. This section gives the seller the right to retake and to have a lien under the mortgaging agreement in said section, but it does not contemplate a situation where the rights of a bona fide purchaser for value have intervened. Neither do we consider this a conditional sale within the meaning of the Uniform Sales Act, as there was no contractual arrangement between the parties that it was to be such, nor does it come within the classification contemplated.

So far as this record discloses, this was not the first sale of the plaintiff to Johnson, but it appears that they had had several transactions prior to the action in question.

The goods were delivered to Schuster by the plaintiff and placed in his showroom, and he was thereby clothed with all the indicia of ownership. It is a well regognized principle that, where one party places it in the power of an other to commit a wrong, he shall not be heard to complain thereafter.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and judgment entered here for the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE
FOR DEFENDANT.

RYNER AND HOLDOM, J. J. CONCUR.

The goods were delivered to Schuster by the plaintiff and placed in his showroom, and he was thereby clothed with all the indicia of ownership. It is a well recognized principle that, where one merely places it in the power of an other to commit a wrong, he shall not be heard to complain thereafter.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and judgment entered here for the defendant.

THE TRIBUNAL: [illegible]
[illegible]

RYAN AND [illegible], J. J., [illegible].

33558

WILLIAM L. VOSS,
(Plaintiff Below) Appellant,

v.

GUST G. BOYSEN, Also known as
GUST G. BOOZAS, FRED VAN BUREN
and Ed. F. Shea,
(Defendant Below) Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

William L. Voss, plaintiff, brought his action in forcible detainer to recover possession of certain premises known as 178 East 154 Street, Harvey, Illinois. The action was directed against Gus. G. Boysen, the lessee, and Fred Van Buren, a sub-tenant under the lessee. The lease contained a provision to the effect that the lessee would not permit the premises to be used for any unlawful purpose, nor allow gambling to be carried on upon the premises. The first floor of the building contained a restaurant and pool room and it is insisted that the gambling was carried on in the basement underneath. Plaintiff was in the habit of delivering groceries and meat to the restaurant operated on the first floor.

Robert L. Cross, a witness called on behalf of plaintiff, testified that he had been in the basement several times and played blackjack there on July 30, 1928. He testified further that he was the agent for the plaintiff and handled his real estate transactions.

32882

WILLIAM L. WOOD, (Plaintiff below) Appellant,	
v.	
GUST G. BOYSEN, also known as GUST G. BOYSEN, JR., and his wife, and M. T. Shea, (Defendant below) Appellee.	

Opinion filed Jan. 8, 1930

Mr. PRESIDING JUSTICE FINCH delivered the opinion of the court.

William L. Wood, plaintiff, brought his action in forcible detainer to recover possession of certain premises known as 170 West 18th Street, Berwyn, Illinois. The action was directed against one, G. Boysen, the lessee, and Fred Van Auken, a sub-tenant under the lessee. The lease contained a provision to the effect that the lessee could not permit the premises to be used for any unlawful purpose, nor allow gambling to be carried on upon the premises. The first floor of the building contained a restaurant and pool room and it is inferred that the gambling was carried on in the basement underneath. Plaintiff was in the habit of receiving complaints and went to the restaurant located on the first floor.

Robert L. Cross, a witness called on behalf of plaintiff, testified that he had been in the basement several times and played Chinchon there on July 4, 1929. He testified further that he was the agent for the plaintiff and handled his real estate transactions.

E. J. Harris, chief of police of Harvey, testified that on December 1, 1928, he arrested a man there for running a game and that he saw cards, and also observed people putting money in a slot and others purchasing chips.

Arthur L. Mock testified that he had visited the pool room in the basement of the premises in question in September 1927, and until October 15, 1928, and that he was there on December 5, 1928, and that there were poker tables and that he bet on the horses and played blackjack. The witness fixed the date as of December 5th, because of the fact that it was the day of the raid. The previous witness, Harris, had fixed the date of the raid as December 1st.

John L. Ott testified on behalf of the plaintiff, that he served a formal notice upon the defendants, by which the plaintiff elected to terminate the lease.

George Goodman testified that he had been in the basement practically every day of the summer of 1928, and that the last time he was there was in October of that year and that there was a blackjack dealer and sheets on the wall with the names of horses and the race numbers and a cage where bets were accepted.

R. P. Wilson testified that he was in the place in September and that there was betting on the horse races.

Gust G. Boysen, a defendant, testified that he was the lessee and that the landlord had tried to buy up his lease and at the time stated that he, the landlord, did not know whether it would be cheaper to throw him out or buy him out. He testified further that his own place of business was on the same street as the leased premises and that he visited said

E. G. Morris, chief of police of Surrey, testified that on December 1, 1928, he arrested a man there for running a game and that he saw cards, and also observed people putting money in a slot and starts producing chips.

Arthur L. Cook testified that he had visited the pool room in the basement of the premises in question in September 1927, and until October 15, 1928, and that he was there on December 5, 1928, and that there were poker tables and that he bet on the horses and played blackjack. The witness fixed the date as 12 December 5th, because of the fact that it was the day of the raid. The previous witness, [illegible], had fixed the date of the raid as December 1st.

John L. Ott testified on behalf of the defendant, that he served a formal notice upon the defendants, by which the plaintiff elected to terminate the lease.

George Goodman testified that he had been in the basement practically every day of the summer of 1928, and that the last time he was there was in October of that year and that there was a blackjack dealer and sports on the wall with numbers of horses and the race numbers, and a [illegible] were accepted.

E. P. Gibson testified that he [illegible] in September and that there was a notice on the [illegible].

Omer G. Boysen, a defendant, testified that he was the lessee and that the landlord had tried to [illegible] and at the time stated that he, the landlord, did not [illegible] whether it would be cheaper to throw him out or [illegible]. He testified further that his own place of business [illegible] same street as the leased premises and that he visited [illegible]

premises and saw some men playing rummy, but there were no race display sheets on the wall and no booths for cashiers to receive money on bets nor was there any blackjack played nor gambling.

Fred Van Buren testified on behalf of the defendant that he had a sub-lease to part of the premises and ran a pool room and cigar store and, in addition, sold soft drinks. That in the front part of the basement there was some lumber and some partitions piled up. That there was a man who rented the basement for the month of November; that he knew the witnesses Mock and Wilson; that they did not come into the basement frequently; that there was no gambling in the basement; that boys sometimes shot craps in the basement. The witness stated further that there were from 75 to 100 people in the pool room and that the premises were large enough to contain eight tables.

William Kahler, a witness called on behalf of defendants, testified that the plaintiff in 1926, asked him to talk with Boysen, to find out how much he would take for his lease.

Mike Prospero, a witness on behalf of the defendants, testified that the plaintiff told him that he wanted to break a lease and said he would give the witness, or anybody else, $200 or $300 to go upon the premises and buy a drink of whiskey, and that he replied that they did not sell whiskey on the premises. He testified further that he was in the basement nearly every day in October, but did not see any betting on races, nor did he see any blackjack played; nor were there any crap tables or gambling.

Lewis Burkett, called as a witness by the plaintiff in rebuttal, testified that in November, 1928, he worked in the

premises and saw some men playing rummy, but there were no tree display sheets on the wall and no booths for cubicles to receive money on bets nor was there any blackjack played nor gambling.

Fred Van Buren testified on behalf of the defendant that he had a sub-lease to part of the premises and ran a pool room and cigar store and, in addition, sold soft drinks. That in the front part of the basement there was some lumber and some partitions piled up. That there was a man who rented the basement for the month of November; that he knew the witnesses Moor and Gibson; that they did not come into the basement frequently; that there was no gambling in the basement; that boys sometimes shot craps in the basement. The witness stated further that there were from 75 to 100 people in the pool room and that the premises were large enough to contain eight tables.

William Mahler, a witness called on behalf of defendants, testified that the plaintiff in 1928, asked him to talk with Boyesen, to find out how much he would take for his lease.

Mike Prospero, a witness on behalf of the defendants, testified that the plaintiff told him that he wanted to break a lease and said he could give the witness, or anybody else, $300 or $500 to go upon the premises and buy a drink of whiskey, and that he replied that they did not sell whiskey on the premises. He testified further that he was in the basement nearly every day in October, but did not see any betting on tables, nor did he see any blackjack played; nor were there any craps tables or gambling.

Lewis Barkett, called as a witness by the plaintiff in rebuttal, testified that in November, 1928, he worked in the

basement under Van Buren's pool room and that he saw Van Buren there nearly every day and that he, the witness, at the time was dealing blackjack and that there was a book for horse races.

Gus Piazza, a witness called on behalf of the plaintiff in rebuttal, stated that he knew Van Buren; that he, the witness, was in charge of the basement in November, 1928, and was running a book, taking bets on horse races; that he had an arrangement with Van Buren, by which Van Buren was to get one-fifth of the profits of the business for the rent of the premises.

The trial court in summing up the facts in this case, found that the plaintiff had accepted the rent for December and further that in his opinion, the character of the witnesses was such, that they could not be believed, and that he was not desirous of breaking a lease on the testimony of such witnesses as were produced on the hearing.

Were we called to pass upon the case as presented by the record, we would be inclined to hold for the plaintiff, in that he had established his case. We have not, however, the same opportunity of seeing and observing the witnesses as the trial judge, nor arriving at an opinion as to their credibility, by a simple reading of the printed questions and answers. The judgment formed by a trial court, after having seen the witnesses, their manner of testifying,. and the apparent candor of each, or lack of candor, is much more liable to be correct than an opinion formed by us, without an opportunity to visualize the different witnesses while in the act of giving their testimony. Courts have recognized this fact and have established the rule that the finding of a trial court in a proceeding without a jury, or of a chancellor in a proceeding, where the witnesses are heard by

[illegible] under the mixer's pool room and that he was [illegible] there nearly every day and that he, the witness, at the time was dealing [illegible] and that there was a book for bets [illegible].

One [illegible], a witness called on behalf of the plaintiff in rebuttal, stated that he knew [illegible] that he, the witness, was in charge of the [illegible] and was running a book, taking bets on horse races; that he had an arrangement with [illegible], by which [illegible] to get one-fifth of the profits of the business for the cost of the premises.

The trial court in summing up the facts in this case, found that the plaintiff had adopted the [illegible] and further that in his opinion, the character of the witnesses was such, that they could not be believed, so that he was [illegible] of bringing a verdict on the testimony of such witnesses as were produced on the hearing.

Were we called to pass upon the case as a trier of the facts, we would be inclined to [illegible] that he did entertain [illegible] were opportunity of seeing and observing the witnesses on the trial judge, not [illegible] by a simple reading of the printed questions and answers. [illegible] judgment formed by a trial court, after having seen the witnesses, their manner of testifying, and the [illegible] of [illegible] look of counter, is most [illegible] to be [illegible] formed by us, without an opportunity [illegible] witnesses while in the act of giving their evidence. [illegible] have recognized this fact and have [illegible] the finding of a trial court in a [illegible] where the witnesses [illegible] opposition in a proceeding, where the witnesses [illegible]

him, will not be reversed, unless the finding is manifestly contrary to the weight of the evidence. People, ex rel Mirsch v. Nagel, 243 Ill. App. 490.

We cannot say under the circumstances that the finding is so manifestly contrary to the weight of the evidence that we should be called upon to substitute our opinion for that of the trial court.

It appears that a checkfor the December rent was paid on the night of December 1st. This check was received by the son of the plaintiff at the plaintiff's home. It was subsequently cashed by plaintiff and no offer to return the money for the December rent was made by the plaintiff. It appears further that if there was any gambling on the premises at all, there certainly was no gambling after December 1st.

Cross, the witness who testified that he was the agent for the plaintiff, stated that he had played blackjack on the premises July 20th, so that it may be said as a matter of fact that the plaintiff had knowledge that there was blackjack played upon the premises prior to December 1, 1928, at which time he accepted the December rent.

The lease contains a clause to the effect that the receipt of rent, or any part thereof, shall not operate as a waiver or right to forfeit the lease for the period still unexpired. We do not believe this clause in the lease has any effect, other than to give the power to the lessor to terminate the lease in the event of a continuing violation. In other words, that the plaintiff had the right to terminate upon a violation of any of the covenants of the lease and would not be bound because of a condonation of a previous breach. By the acceptance

him, will not be reversed, unless the finding is manifestly contrary to the weight of the evidence. People, ex rel Hirsch v. Kassel, 265 Ill. App. 430.

We cannot say under the circumstances that the finding is so manifestly contrary to the weight of the evidence that we should be called up a to substitute our opinion for that of the trial court.

It appears that a check for the December rent was paid on the night of December 1st. This check was received by the son of the plaintiff at the plaintiff's home. It was subsequently cashed by plaintiff and no offer to return the money for the December rent was made by the plaintiff. It appears further that if there was any rumbling on the premises at all, there certainly was no rumbling after December 1st.

Cross, the witness who testified that he was the agent for the plaintiff, stated that he had placed blacklight on the premises July 20th, so that it may be said as a matter of fact that the plaintiff had knowledge that there was blacklight placed upon the premises prior to December 1, 1938, at which time he accepted the December rent.

The lease contains a clause to the effect that the receipt of rent, or any part thereof, shall not operate as a waiver or right to forfeit the lease for the period still unexpired. We do not believe this clause in the lease has any effect, other than to give the power to the lessor to terminate the lease in the event of a continuing violation. In other words, that the plaintiff had the right to terminate upon a violation of any of the covenants of the lease and would not be bound because of a condonation of previous violations by the acceptance

of rent, however, he would be held to have waived his right of action because of any breach occurring prior to the acceptance of the rent, if he knew at the time that there had been a breach of the covenant. Arado v. Maharis, 232 Ill. App. 282; Shephard, et al. v. Dye, et al, 137 Wash. 180; Zotalis v. Cannellos, 138 Minn. 179.

After the starting of the cause of action, plaintiff would not be precluded from accepting rent, because by the starting of the action, he had exercised his option to terminate, whereas, by the acceptance of rent prior to the starting of the action, he would have waived his option to terminate. Plaintiff served his notice to terminate the lease on the 15th day of December, 1928. This notice to terminate was not accompanied by the return of the December rent. The trial court held that this constituted waiver of his right to maintain the action. The question presented for the trial court was one as to whether or not at the time the plaintiff accepted the rent, knowing of the fact that there had been breaches of the covenant, he intended to waive the breach. This intention had to be gathered, not only from the element of time, but from all the other facts and circumstances in the case. If, as a matter of fact, at the time the rent was accepted, it was intended by plaintiff as a waiver of the breach, then he could not maintain the action. The trial court having so found, as stated in his opinion, we can not say that the finding was manifestly against the weight of the evidence.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

RYNER AND HOLDOM, JJ. CONCUR.

of rent, however, he would be held to have waived his right of action because of any breach occurring prior to the acceptance of the rent, if he knew at the time that there had been a breach of the covenant. Arado v. Mahrle, 332 Ill. App. 384; Sherwood, et al. v. Dye, et al, 127 Wash. 180; Rotella v. Jennelion, 138 Minn. 179.

After the starting of the cause of action, plaintiff would not be precluded from accepting rent, because by the starting of the action, he had exercised his option to terminate, whereas, by the acceptance of rent prior to the starting of the action, he would have waived his option to terminate. Plaintiff served his notice to terminate the lease on the 15th day of December, 1932. This notice to terminate was not accompanied by the return of the December rent. The trial court held that this constituted waiver of his right to maintain the action. The question presented for the trial court was one as to whether or not at the time the plaintiff accepted the rent, knowing of the fact that there had been breaches of the covenant, he intended to waive the breach. This intention had to be gathered, not only from the element of time, but from all the other facts and circumstances in the case. If, as a matter of fact, at the time the rent was accepted, it was intended by plaintiff as a waiver of the breach, then he could not maintain the action. The trial court having so found, as stated in his opinion, we can not say that the finding was manifestly against the weight of the evidence.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HYNES AND HOLDOM, JJ., CONCUR.

33576

255 I.A. 624

PETER CONROY,

Appellee,

v.

RELIANCE ELEVATOR COMPANY and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., a Corp.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinibn filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

Peter Conroy, plaintiff, filed his statement of claim in the Municipal Court, charging that on January 9, 1925, he was employed by the Reliance Elevator Company, a corporation, a defendant in this proceeding; that in October, 1925, at the request of the Reliance Elevator Company, plaintiff called at the office of the Zurich General Accident and Liability Insurance Company, the other defendant in this proceeding, and was given two checks, - one for $105 and one for $30, which were in payment for temporary compensation. Charges that these checks were lost or destroyed, and that the defendant last named promised to issue new checks, but failed so to do. The defendants in their affidavit of merits admitted that the plaintiff sustained accidental injuries while in the course of his employment on June 9, 1925; that said injuries arose out of and in the course of his employment and that the plaintiff and the defendant Reliance Elevator Company were operating under and subject to the Workmen's Compensation Act.

33676

PETER DORNOY,

Appellee,

v.

RELIANCE ELEVATOR COMPANY and
EMPLOYERS GENERAL LIABILITY AND
LIABILITY INSURANCE COMPANY,
LTD., a Corp.,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 3, 1930

MR. PRESIDING JUSTICE MILLER delivered the opinion of the court.

Peter Dornoy, plaintiff, filed his statement of claim in the municipal court, charging that on January 3, 1928, he was employed by the Reliance Elevator Company, a corporation, a defendant in this proceeding; that in October, 1928, at the request of the Reliance Elevator Company, plaintiff called at the office of the Illinois General Accident and Liability Insurance Company, the other defendant in this proceeding, and was given two checks, - one for $100 and one for $50, which were in payment for temporary compensation. Charges that these checks were lost or destroyed, and that the defendant last named promised to issue new checks, but failed so to do. The defendants in their affidavit of merits contended that the plaintiff sustained accidental injuries while in the course of his employment on June 3, 1928; that said injuries arose out of and in the course of his employment and that the plaintiff under and subject to the Workmen's Compensation Act.

Further charges that plaintiff filed an application for adjustment of the claim with the Industrial Commission of the State of Illinois September 17, 1928, a copy of which statement of claim is attached to the affidavit of merits and made a part thereof. Charges that there was a hearing on February 6, 1929, at which time a claim was made before the Industrial Commission for the amount set out in the statement of claim. in this proceeding; charges further that the Zurich General Accident and Liability Insurance Company, is the insurance carrier of the Reliance Elevator Company under the provision of the Workmen's Compensation Act of Illinois. Defendants further claim that they are not liable to pay any sum unless found to be liable by the Industrial Commission and deny that there was any good or valuable consideration for the issuance of the checks.

In the course of the discussion before the trial court, a statement was made to the effect that this claim filed before the Industrial Commission had been withdrawn, but there is no evidence in the record in substantiation of this fact.

The Workmen's Compensation Act is a statutory provision which was enacted for the purpose of providing a forum with jurisdiction of all claims arising thereunder. The act was passed for the purpose, not only of providing for a place where the parties could adjust their differences, but, by its terms, it was intended to exclude all other forums. It is a statutory provision intended not only to protect the rights of the parties, but the welfare of the State. The Industrial Commission provided for in said Act could not be deprived of its jurisdiction by agreement even of the parties themselves. International Coal & Mining Co. v. Industrial Commission, 293 Ill. 524.

Further charges that plaintiff filed an application for adjustment of the claim with the Industrial Commission of the State of Illinois September 17, 1942, a copy of which statement of claim is attached to the affidavit of merits and made a part thereof. Charges that there was a hearing on February 8, 1943, at which time a claim was made before the Industrial Commission for the amount set up in the statement of claim.

In this proceeding; charges further that the United General Casualty and Liability Insurance Company, is the insurance carrier of the Holiness Aletator Company under the provisions of the Workmen's Compensation act of Illinois. Defendants further claim that they are not liable to pay any sums found to be liable by the Industrial Commission and deny that there was any good or valuable consideration for the issuance of the checks.

In the course of the discussion before the trial court, a statement was made to the effect that this claim filed before the Industrial Commission had been withdrawn, but there is no evidence in the record in substantiation of this fact.

The Workmen's Compensation act is a statutory provision which was enacted for the purpose of providing a forum with jurisdiction of all claims arising thereunder. The act was passed for the purpose, not only of providing for a place where the parties could adjust their differences, but, by its terms, it was intended to exclude all other forums. It is a statutory provision intended not only to protect the rights of the parties, but the welfare of the state. The Industrial Commission created for in said act could not be deprived of its jurisdiction by agreement even of the parties themselves. <u>International Harv. Mining Co. v. Industrial Commission</u>, 395 Ill. 344.

While the insurance carrier provided by law is primarily liable, it is also subject to the jurisdiction of the commission and its liability is dependent upon the relationship of the parties.

No evidence was heard in the proceeding at bar, but the judgment appears to have been entered upon the pleadings. On the facts as set forth in the pleadings it appears that the Municipal Court of Chicago did not have jurisdiction to entertain the cause of action, as the matter was then pending before the Industrial Commission.

There was no evidence upon which a judgment could be entered against the defendant, Reliance Elevator Company, and there is nothing in the statement of claim which would warrant a judgment against it. If for no other reason, the cause should be reversed as a joint judgment could not be entered where there was no liability as to one of the defendants.

Because of the fact that the trial court had no jurisdiction of the matter, it necessarily follows that the plaintiff be required to resort to the Industrial Commission for such relief as he may have.

For the reasons stated in this opinion, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

RYNER AND HOLDOM, JJ. CONCUR.

While the insurance carrier provided by law is primarily liable, it is also subject to the jurisdiction of the commission and its liability is dependent upon the relationship of the parties.

No evidence was heard in the proceeding at bar, but the judgment appears to have been entered upon the pleadings. On the facts as set forth in the pleadings, it appears that the municipal court of Chicago did not have jurisdiction to determine the cause of action, as the matter was then pending before the industrial commission.

There was no evidence upon which a judgment could be entered against the defendant, Williams Laundry Company, and there is nothing in the statement of claim which could support a judgment against it. For no other reason, the cause should be reversed as a joint judgment could not be entered where there was no liability as to one of the defendants.

Because of the foregoing, the trial court had no jurisdiction of the matter, it necessarily follows that the plaintiff be remanded to resort to the industrial commission for such relief as he may have.

For the reasons stated in this opinion, the judgment of the municipal court is reversed.

Judgment reversed.

LYONS and McGOOEY, JJ., concur.

73a

255 I.A. 624

33988

MARTIN URBAITIS, otherwise known as MARTIN URBUTIS,

Appellee,

v.

VALERIA URBAITIS, otherwise known as Valeria Urbutis, et al,

FRANK STANKUS,

Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Jan. 2, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal by Frank Stankus, one of the two defendants, from an interlocutory decree for an injunction restraining him from instituting any foreclosure suit under a certain trust deed in which he is named as trustee. The interlocutory decree was granted without notice and without bond and is based upon the bill of complaint and the affidavit thereto attached.

The bill of complaint charges that the complainant, Martin Urbaitis, was married to the defendant, Valeria Urbaitis, until February 1920, when she left the complainant; that she subsequently, in 1925, returned to complainant and they lived together as husband and wife; that shortly thereafter complainant purchased the real estate in question with his own funds, paying $5,000 therefor, of which he had borrowed $2,000 from the defendant, Frank Stankus; that the legal title was taken in the name of complainant and his wife in

33968

MARTIN URBANITE, otherwise known as MARTIN URBUTIE, Appellee,	ENTHUSIOTRAVERSAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
VALERIA URBANITE, otherwise known as Valeria Urbutie, et al.,	
FRANK STANKUS, Appellant.	

Opinion filed Jan. 3, 1930

MR. PRESIDING JUSTICE DUNN delivered the opinion of the court.

This is an appeal by Frank Stankus, one of the two defendants, from an interlocutory decree for an injunction restraining him from instituting any ferecloseure suit under a certain trust deed in which he is named as trustee. The interlocutory decree was granted without notice and without bond and is based upon the bill of complaint and the affidavit thereto attached.

The bill of complaint charges that the complainant, Martin Urbanite, was married to the defendant, Valeria Urbanite, until February 1920, when she left the complainant; that she subsequently, in 1928, returned to complainant and they lived together as husband and wife; that shortly thereafter complainant purchased the real estate in question with his own funds, paying $5,000 therefor, of which he had borrowed $2,000 from the defendant, Frank Stankus; that the legal title was taken in the name of complainant and his wife in

joint tenancy; that upon the borrowing of the money from the defendant Stankus, a trust deed was given to him as security to secure his note for that amount; that this note was payable two years after date with interest at five per cent; that the defendants, Valeria Urbaitis and Frank Stankus, combined and confederated together and caused the removal of the complainant from his house; that the said Stankus is trustee under the said trust deed and is the legal holder and owner of the notes secured by said trust deed and is threatening to sue complainant and to institute foreclosure proceedings, based upon pretense that the interest payments had not been made.

The affidavit in support of the bill of complaint, states that the complainant's rights would be unduly prejudiced unless an injunction was issued immediately, without notice and without bond. The reason stated in the affidavit for the waiving of the bond is based upon the statement that the complainant is financially unable to give a bond.

The order recites that, upon a reading of the bill and the affidavit thereto attached, and it appearing that there is good cause shown, it is ordered that an injunction issue in the above entitled cause without notice and without bond.

Chapter 69, Section 3, Cahill's Illinois Revised Statutes of 1929, provides:

> "3. NOTICE OF APPLICATION.) § 3. No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the bill of affidavit accompanying the same,

joint tenancy; and upon the borrowing of the money from the defendant Swanson, a trust deed was given to him as security to secure his note for that amount; that this note was payable two years after date with interest at five per cent; that the defendants, Valeria Brownlie and Frank Swanson, combined and confederated together and caused the removal of the complainant from his house; that the said Brownlie is trustee under the said trust deed and is the legal holder and owner of the notes secured by said trust deed and is attempting to sue complainant and to institute foreclosure proceedings, based upon pretense that the interest payments had not been made.

The affidavit in question [illegible] of complaint, states that the complainant's rights can be merely prejudiced unless an injunction was issued immediately, without notice and without bond. The reason stated in the affidavit for the waiving of the bond is based upon the statement that the complainant is financially unable to give a bond.

The order recites that, upon a reading of the bill and the affidavit thereto attached, and it appearing that there is good cause shown, it is ordered that an injunction issue in the above entitled cause without notice and without bond.

Chapter 22, section 3, Illinois Revised Statutes of 1903, provides:

> "3. NOTICE OF APPLICATION.) § 3. No court, judge or master shall grant an injunction without notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear from the bill or affidavit [illegible]

that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice."

Section 9, provides that before the issuance of an injunction, complainant shall give bond, except for good cause shown. There are no facts set out in the bill of complaint or the affidavit, upon which the order could have been entered granting an injunction without notice. The statement that unless the injunction issue without notice, the complainant would suffer irreparable injury and loss, is a conclusion and not such a statement of fact as would warrant the issuance of the injunction. Grabarski v. Stankowicz, 179 Ill. App. 45.

A court granting an interlocutory injunction without bond should require such facts, either in the sworn bill of complaint or by affidavit, or by evidence heard, as would warrant the court in arriving at an opinion from such facts, that the complainant would be irreparably injured. The allegation that the complainant was financially unable to give a bond, is not a sufficient allegation of fact, particularly as the bill charges he was the owner of the premises in question.

There is no allegation that the defendant is insolvent or about to leave the State, or any fact in regard to the defendant which would authorize the issuing of the injunction without bond. The statute is primarily for the purpose of protecting the person against whom the injunction issues. If it would appear that no harm would be done by the issuance of such injunction without bond, then that fact might be taken into consideration by the court, but no such

> that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice."

Section 3, provides that before the issuance of an injunction, complainant shall give bond, except for good cause shown. There are no facts set out in the bill of complaint or the affidavit, upon which the order could have been entered granting an injunction without notice. The statement that unless the injunction issue without notice, the complainant would suffer irreparable injury and loss, is a conclusion and not such a statement of fact as would warrant the issuance of the injunction. Graybarth v. Hamilton, 179 Ill. Dep. 48.

> A court granting an interlocutory injunction without bond should require such facts, either in the sworn bill of complaint or by affidavit, or by evidence heard, as would warrant the court in arriving at an opinion from such facts, that the complainant would be irreparably injured. The allegation that the complainant was financially unable to give a bond, is not a sufficient allegation of fact, particularly as the bill charges he was a owner of the premises in question.

There is no allegation that the defendant is insolvent or about to leave the State, or any fact in regard to the defendant which would authorize the issuing of the injunction without bond. The statute is primarily for the purpose of protecting the person against whom the injunction issues. If it was clear that no harm would be done by the issuance of such injunction without bond, then that fact might be taken into consideration by the court, but as such

facts appear in the present proceeding. The injunction should not have been issued without notice nor without bond.

For the reasons stated in this opinion, the interlocutory decree is reversed.

INTERLOCUTORY DECREE REVERSED.

RYNER AND HOLDOM, JJ. CONCUR.

facts appear in the present proceeding. The injunction should not have been issued without notice nor without bond.

For the reasons stated in this opinion, the interlocutory decree is reversed.

INTERLOCUTORY DECREE REVERSED.

EVERS AND HOLDEN, JJ. CONCUR.

37491

BENJAMIN G. POLLARD,

Appellant,

v.

WILLIAM E. McCOY, trading as The Grand Hotel,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

255 I.A. 624

Opinion filed Jan. 2, 1930

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment of nil capiat and for costs on a trial before the court without a jury. It is said to be an action of replevin, but all we find abstracted in relation thereto is:

> "September 21, 1928, affidavit for replevin filed, Affidavit of replevin.
> September 21, 1928, a certain writ of replevin issued out of the office of the Clerk of the Municipal Court."
> "September 28, 1928, replevin bond filed. Replevin bond."

There is no mention of any property replevined. It is impossible to say from the abstract whether it is a horse, or a calf, or household furniture, or a trunk which is the subject matter of the replevin suit, and it is a well settled rule of this court that we will not go to the record for any fact necessary to reverse a judgment. Therefore, the abstract which is the pleading of the parties, presents nothing for review.

Further perusing the trial we come to the evidence and about all we find is that plaintiff went to live at Hotel Grand on the 19th day of September, 1928; that he lived there about a year and he voted from that hotel, giving his former

Appeal

STATEMENT OF CONSTRUCTION,

Appellant,

v.

WILLIAM E. MOTLEY, trading as The Grand Hotel,

Appellee.

Opinion filed Jan. 2, 1930

Mr. JUSTICE McSURLY delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment of nil capiat and for costs on a trial before the court without a jury. It is said to be on motion of appellee, but all we find contained in relation thereto is:

"September 2, 1929, attorneys for respective parties, affidavit of respective.
September 21, 1929, a certain writ of replevin issued out of the office of the clerk of the municipal court."
"September 26, 1929, replevin bond filed.
replevin bond."

There is no motion of any character in record. It is impossible to say from the abstract whether it is a bond, or a suit, or homestead exemption, or a trick which is the subject matter of the replevin suit, and it is a well settled rule of this court that we will not go to the record for our first necessary to reverse a judgment. Further, the abstract of the pleading of the parties, contains nothing [illegible].

Neither pleading the trial we come to the evidence and about all we find is that plaintiff entered into a lease [illegible] on the 15th day of September, 1929, [illegible] for about a year and he voted from [illegible]

place of residence, tells about renting a room at $17 a week and that he paid in advance according to his undertaking; he tells about the time he lived there, during part of which time he was at Camp Grant at Rockford, Illinois, and that there was a restaurant in connection with the hotel at times. The court asked the witness; "Do you owe them anything", to which he replied "yes"; then the court asked "how much" and he answered "about $62" and that he never tendered them the money. And that is all of his testimony, which comprised all of the testimony proffered on behalf of plaintiff.

In this state ofthe proofs there was naught before the trial court nor this court which entitled the plaintiff to recover in the alleged action of replevin.

As in the state of the abstract and the evidence found therein plaintiff proved no cause of action of any kind, the trial court did not err in finding the issues for the defendant, and its judgment is therefore affirmed.

AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

place of residence, tells about renting a room at 47 a week and that he paid in advance according to his understanding; he tells about the time he lived there, until part of that time he was at Long Crest at Rockford, Illinois, and that there was a restaurant in connection with the hotel at times. The court asked the witness: "Do you see them anything", to which he replied "yes"; then the court asked "how much" and he answered "about 50" and that he never condoned them the money. And that is all of his testimony, which constituted all of the testimony proffered on behalf of plaintiff.

In this state, the trial court sustained the motion of the defendant to recover in the alleged action of replevin.

As in the state of Ohio cases, the evidence found therein plaintiff moved no sums of money of any kind, the trial court did not err in finding the issues for the defendant, and the judgment is therefore affirmed.

.....

WILSON, P.J., AND O'NEAL, J., CONCUR.

95a 7

33338

R. WILLIAMS,

Appellee,

v.

MRS. PHILIP R. O'BRIEN,

Appellant.

255 I.A. 624

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff recovered a judgment in the Municipal Court of Chicago, upon a trial without a jury, for $175.00, for damages caused to his automobile, because of a collision with an automobile in the possession and control of the defendant.

At the time of the accident the plaintiff was driving a Ford automobile in an easterly direction on Grand Avenue in the City of Chicago. The defendant was driving a Cadillac automobile in a southerly direction on Wells Street, an intersecting highway. There is a conflict in the testimony as to the rate of speed at which the plaintiff's car was being operated and as to the place where the accident occurred. There were two street-car tracks on each highway. There were no signal lights at the intersection. On direct examination the plaintiff testified that he approached the intersection, going east, at a normal rate of speed; that when he got to possibly the center of Wells Street a street-car passed him, going in a westerly direction on Grand Avenue and that the defendant was not driving fast. On cross-examination he said that when he passed the street-car "it was probably about two-thirds across the crossing"; that when he entered the intersection the

23320

H. Williams,

Appellee,

v.

PHIL. H. O'NEIL,

Appellant.

Opinion filed Jan. 2, 1930

MR. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff recovered a judgment in the municipal court of Chicago, upon a trial without jury, for $[illegible], for damages caused to his automobile, [illegible] collision with an automobile in the possession and control of the defendant.

At the time of the collision the plaintiff was driving a ford automobile in a [illegible] on Grand Avenue in the city of Chicago. [illegible] a parking [illegible] automobile in a southerly direction [illegible] street, an intersecting street. There is a conflict in the testimony as to the rate of speed at which the plaintiff's car was [illegible] operated and as to the [illegible] the relative positions. There were two street-car tracks on [illegible] Avenue. There [illegible] signal lights in the intersection. [illegible] evidence the plaintiff testified that [illegible] the intersection, [illegible] east, at a normal rate of speed; that [illegible] the center of the street [illegible] street-car tracks line, going in a westerly direction on Grand Avenue [illegible] defendant was not driving fast. [illegible] the street-car "stop" [illegible] across the crossing; [illegible]

street-car was about even with the west tracks on Wells street; that he was going at the rate of fifteen miles per hour and that he did not see the defendant's automobile until it was about ten feet away. Upon examination by the court, he stated that his car was in the middle of Wells Street when the defendant's automobile struck the front of his automobile.

The defendant testified that she stopped before entering the intersection and that before proceeding southward the back end of the street-car referred to by the plaintiff had reached the sidewalk or "the path for the pedestrians on the west hand side of Wells Street"; that in her opinion the plaintiff's automobile was going at a rate of about twenty-five or thirty miles per hour; that when she first noticed the street-car it was in the center of the intersection.

The court then interrogated the defendant, and the questions put and the answers made were as follows:

> "The Court: Where was the Ford car when you started up on low gear after the passage of the street car beyond your vision, how far was the Ford car from your vision at that time?
> A. It was not in my sight at all.
> The Court: It must have been sometime.
> A. When I reached the intersection of Wells and Grand Avenue.
> The Court: How far was that away.
> A. It was just to the right, about twenty-five or thirty feet.
> The Court: You had not seen it before?
> A. The street car had passed, and had cleared the other side of the street, the west side of Wells Street, and there was no other traffic coming, so I started up in low gear, and just as I reached the center of the intersection, this Ford car, at a high rate of speed, crashed into me."

The only other witness to the accident was Walter Earle. He was going north on Wells street and, before crossing

street-car was about even with the west crosswalk on Main street; that he was going at the rate of fifteen miles per hour and that he did not see the defendant's automobile until it was about ten feet away. Upon examination by the court, he stated that his car was in the middle of Main street when the defendant's automobile struck the front of his automobile.

The defendant testified that she stopped before entering the intersection and that before proceeding southward the back end of the street-car referred to by the plaintiff had reached the sidewalk or "the path for the pedestrians on the west hand side of Main Street"; that in her opinion the plaintiff's automobile was going at a rate of about twenty-five or thirty miles per hour; that when she first noticed the street-car it was in the center of the intersection.

The court then interrogated the defendant, and the questions and the answers were as follows:

> "The Court: Where was the field car when you started up on Joe Ayer street the remainder of the street car beyond your vision, how far was the field car from your vision at that time?
> A. It was not in my sight at all.
> The Court: It must have been something.
> A. When I reached the intersection of Main and Grand avenue.
> The Court: How far was that away.
> A. It was just to the right, about twenty-five or thirty feet.
> The Court: You had not seen it before?
> A. The street car had gone on, he had crossed the other side of the street, the west side of Main Street, and there was no other traffic coming, so I started up in low gear, and just as I reached the center of the intersection, I saw the car, at a high rate of speed, crashed into me."

The only other witness to the accident was a waiter named. He was going north on Main street at 9:, before crossing

Grand Avenue, stopped his automobile for about thirty seconds. He testified that, in his opinion, the plaintiff's automobile, just before entering the intersection, was going at a rate of twenty-five to thirty miles per hour. The significant feature of his testimony is that he repeatedly stated that he did not see the street car which both the plaintiff and the defendant say was crossing Grand Avenue just before the accident happened.

The trial judge, at the close of the case, commented upon the fact that the witness Earle testified that he did not see the street-car although he observed that the plaintiff's automobile was going at the rate of twenty-five to thirty miles per hour. He also expressed an opinion that if the plaintiff was going at that rate of speed and the defendant entered the intersection with her automobile in low gear the accident could not have happened.

There is considerable discussion in the briefs about the statute giving the drivers of automobiles, approaching from the right, the right of way. The defendant cites a number of cases which hold that all of the facts and circumstances surrounding the accident should be taken into consideration and that the statute should not be so applied as to give the exclusive right of way to the party approaching from the right, in all cases. With this rule we agree. But in the instant case neither party discovered the presence of the other until it was too late to avoid a collision. Under the circumstances the court was justified in finding that the street car obscured the vision of both parties and that the defendant was at fault in entering the intersection until she was assured that no vehicle was approaching from the right. In addition to this, the

Grand Avenue, stopped his automobile for about thirty seconds. He testified that, in his opinion, the plaintiff's automobile, just before entering the intersection, was going at a rate of twenty-five to thirty miles per hour. The significant feature of his testimony is that he repeatedly stated that he did not see the street car which took the plaintiff and the defendant say was crossing Grand Avenue just before the accident happened.

The trial judge, at the close of the case, commented upon the fact that the plaintiff, while testified that he did not see the street-car although he observed that the plaintiff's automobile was going at the rate of twenty-five to thirty miles per hour. He also expressed an opinion that if the plaintiff was going at that rate of speed and he entered the intersection with her automobile in too near the accident could not have happened.

There is considerable discussion in the briefs about the statute giving the drivers of automobiles, generally, the right, the right of way. The defendant cites a number of cases which hold that all of the facts and circumstances surrounding the accident should be taken into consideration in that the statute cannot not be so applied as to give the exclusive right of way to the driver approaching from the right, in all cases. With this rule we agree. But in the instant case neither party discovered the presence of the other until it was too late to avoid a collision. Under the circumstances the court was justified in finding that the street car operator the vision of both parties and that the defendant was at fault in entering the intersection until the car approached so close as to be dangerous, from the right. In addition to this, the

defendant, when interrogated by the court, first stated that when she started to enter the intersection the plaintiff's automobile was not in sight. Then she testified that when she reached the intersection of Wells street and Grand Avenue the plaintiff's automobile was about twenty-five or thirty feet to the right. She said this despite the fact that she had previously testified that when she first saw the plaintiff's automobile she did not have time to put her foot on the brake or clutch before the collision took place.

We find nothing in the record which would warrant us in disturbing the finding of the trial court that the defendant was liable for the damage to the plaintiff's automobile.

An automobile mechanic of twenty-seven years experience testified that the plaintiff's automobile, before the accident was worth $200.00 or $250.00 and that it would cost about that amount to put it in good condition. He further testified that he hardly thought that the automobile, before the accident, could have been sold for the amount at which he valued it. The trial court fixed the damages at $175.00. He would have been warranted in assessing damages in a larger amount but of this the defendant ought not complain.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

defendant, when interrogated by the court, first stated that when she started to enter the intersection the plaintiff's automobile was not in sight. Then she testified that when she reached the intersection of Wells street and Irwin avenue the plaintiff's automobile was about twenty-five or thirty feet to the right. She said this despite the fact that she had previously testified that when the first saw the plaintiff's automobile she did not have time to put her foot on the brake or sounds before the collision took place.

We find nothing in the record which could warrant us in disturbing the finding of the trial court that the defendant was liable for the damage to the plaintiff's automobile.

An automobile mechanic of twenty-seven years experience testified that the plaintiff's automobile, before the accident was worth $[illegible].00 or $[illegible].00 and that it would cost about that amount to put it in good condition. He further testified that he hardly thought that the automobile, before the accident, could have been sold for the amount at which he valued it. The trial court fixed the damages at $[illegible]. We could have been warranted in assessing them as low as [illegible] amount but if this the defendant could not complain.

The judgment of the municipal court is affirmed.

[illegible].

SILVER, P.J. AND BROWN, J. concur.

33348

255 I.A. 624

MORRIS FORMAN, Trading as Forman's Furniture Store, Appellee,	APPEAL FROM
v.	MUNICIPAL COURT
FRANK BALSAMO, Appellant.	OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff instituted suit in the Municipal Court of Chicago to recover from the defendant the contract price of a piano. There was a trial before the court, without a jury. The court found in favor of the plaintiff, assessed his damages at the sum of $1500.00 and entered judgment upon the finding. The defendant appealed.

The statement of claim alleged that the plaintiff sold the piano to the defendant, "for the contract price of $1500.00", that the piano was delivered to the home of the defendant, on July 13, 1927, and that thereupon the sum of $1500.00 became immediately due and payable. In his affidavit of merits the defendant, among other things, swears that he did not purchase a piano from the plaintiff at a contract price of $1500.00, or at any other price.

It appears from the undisputed facts that the piano was delivered at the home of the defendant on July 13, 1927, that later the defendant requested the plaintiff to remove the instrument, and, upon the latter's failure so to do, the defendant, upon the advice of an attorney, placed the piano in a warehouse and caused the warehouse receipt to be sent to the plaintiff.

STATE

DONNY FRANK, Trading as
Peterson's Furniture Store,

Appellee,

v.

FRANK DALMANO,

Appellant.

Opinion filed Jan. 2, 1930

MR. JUSTICE DUFFY delivered the opinion of the court.

The plaintiff instituted suit in the municipal court of Chicago to recover from the defendant the contract price of a piano. There was a trial before the court, without a jury. The court found in favor of the plaintiff, assessed his damages at the sum of $1890.00 and entered judgment upon the finding. The defendant appealed.

The statement of claim alleged that the plaintiff sold the piano to the defendant, for the contract price of $1890.00, that the piano was delivered to the home of the defendant, on July 12, 1927, and that thereupon the sum of $1890.00 became immediately due and payable. In his affidavit of merits the defendant, among other things, avers that he did not purchase a piano from the plaintiff at a contract price of $1890.00, or at any other price.

It appears from the undisputed facts that the piano was delivered at the home of the defendant on July 12, 1927, that later the defendant remembered the plaintiff in regard to the instrument, and, upon the latter's failure so to do, the defendant, upon the advice of an attorney, placed the piano in a warehouse and caused the warehouse receipt to be sent to the plaintiff.

The plaintiff testified that he sent the receipt to the warehouse company with a statement that he had no interest in the piano.

The plaintiff testified to conversations with the defendant which were to the effect that the defendant made an outright purchase of the piano. The defendant, his daughter and his wife all testified to conversations which, if true, showed that the instrument was to be paid for only upon approval.

One of the principal points relied upon by counsel for the defendant for a reversal of the judgment of the trial court, is that there was no proof made of a contract price for the piano or any evidence of its value. We have read the abstract and also the original bill of exceptions, contained in the transcript of record, and find no evidence whatever, offered as to the value of the instrument. The only evidence of an agreed price was the conclusion of the plaintiff, when asked if the price of the piano was discussed, that "the price of the piano was fixed at $1500.00." Counsel for the defendant promptly moved to strike the answer on the ground that it was a conclusion of the witness. His motion was sustained, and properly so. Counsel for the plaintiff does not complain of this ruling. With this testimony stricken, the record is left barren of any evidence of either an agreed price or the value of the piano. For this reason the judgment must be reversed.

We would be disposed to remand the cause except for the fact that, upon the oral announcement of the court's finding, counsel for the defendant immediately raised the question as to whether the court found that there was an agreement as to the price of the piano. If counsel for the plaintiff had any evidence

The plaintiff testified that he sent the receipt to the warehouse company with a statement that he had no interest in the piano.

The plaintiff testified to conversations with the defendant which were to the effect that the defendant made an outright purchase of the piano. The defendant and his wife had testified to conversations which, if true, showed that the instrument was to be held for only upon approval.

One of the material points relied upon by counsel for the defendant for a reversal of the judgment of the trial court, is that there was no proof made of a contract price for the piano or any evidence of its value. We have read the abstract and also the original bill of exceptions, contained in the transcript of record, and find no evidence whatever, offered as to the value of the instrument. The only evidence of an agreed price was the conclusion of the plaintiff, when asked if the price of the piano was discussed, that the price of the piano was fixed at $[illegible]. Counsel for the defendant promptly moved to strike the answer on the ground that it was a conclusion of the witness. The motion was sustained, and properly so. Counsel for the plaintiff does not complain of this ruling. With this testimony stricken, the record is left barren of any evidence of either an agreed price or the value of the piano. For this reason the judgment was reversed.

We would be disposed to remand the cause even if for the fact that, upon the oral announcement of the court, counsel for the defendant improperly raised the question, whether the court found that there was an agreement as to the price of the piano. If counsel for the plaintiff relied on evidence

to support the statement of claim, which alleged a contract price, and had overlooked the presentment of it, he should, at least, have asked the trial court's indulgence for the opportunity of offering to make such proof, instead of speculating upon whether the defendant would perfect his appeal and, if so, what the decision of this court might be.

The judgment of the Municipal Court of Chicago is, therefore, reversed and judgment entered here in favor of the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

WILSON, P.J. AND HOLDOM, J. CONCUR.

to support the statement of claim,which alleged a contract price, and had overlooked the presentment of it, he should, at least, have asked the trial court's indulgence for the opportunity of offering to make such proof, instead of speculating upon whether the defendant would perfect his appeal and, if so, what the decision of this court might be.

The judgment of the Municipal Court of Chicago is, therefore, reversed and judgment entered here in favor of the defendant.

JUDGMENT REVERSED AND JUDGMENT HERE.

WILSON, P.J., and BOLGER, J., concur.

33392

WALLACE SYSTEM, Inc., Appellee, v. DAVID RIORDAN, Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 625

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court:

The plaintiff brought suit in the Municipal Court of Chicago to recover the amount allgged to be due under a contract in writing, which was as follows:

"WALLACE SYSTEM, INC.
11th Floor Medinah Bldg.
178 W. Jackson Blvd.

The undersigned hereby agrees to take the Wallace System of Physical Training, a service consisting of health building treatments, physical training and instruction, baths and massage as outlined in your circular, for the period of six (6) months from date hereof.

Wallace System, Inc., an Illinois corporation, agrees to maintain its establishment, furnish competent instructors and the within named service for the period of this agreement at 178 W. Jackson Blvd., Chicago, during the hours of 9 A. M. to 6:30 P. M. daily, Sundays and legal holidays excluded.

The undersigned in consideration of the above agrees to pay Wallace System, Inc. the sum of Two Hundred Dollars ($200) within 10 days after the date hereof, which amount undersigned agrees to pay irrespective of the extent to which he may avail himself of the above named service.

In the event that fire or other cause beyond control of Wallace System, Inc. necessitates temporary closing of its quarters, the period above mentioned shall be extended a number of days equal to such shut-down period.

Wallace System, Inc. agrees upon request to examine blood pressure of undersigned from time to time, but assumes no other responsibility in regard to health or physical condition of undersigned.

Signed at Chicago, Illinois, this 30th day of Jan. 1928.

David Riordan (Seal)

ACCEPTED: Cash 100. Bal. 30 days
WALLACE SYSTEM, INC.
By Ambrose E. Deiss
Vice Pres."

[illegible]

[illegible] SYSTEM, Inc.,
Appellee,

v.

DAVID NICOLSON,
Defendant.

[illegible]

Opinion filed Jan. 2, 1930

MR. JUSTICE [illegible] delivered the opinion of the court:

The plaintiff brought suit in the municipal court of Chicago to recover the amount alleged to be due under a contract in writing, which was as follows:

[illegible] SYSTEM, Inc.
[illegible] Floor Medical Bldg.
[illegible] St. [illegible] Ave.

The undersigned hereby agrees to use the Wallace System of Physical Training, a course combining of health building, [illegible], physical training and instruction, diets and massage as outlined in your circular, for the period of six (6) months from date hereof.

Wallace System, Inc., is hereby authorized, upon written instructions and [illegible] to [illegible] for the omission of this agreement as its [illegible] Chicago, during the hours of [illegible] to [illegible] daily, Sundays and holidays excepted.

The undersigned in consideration of the above agrees to pay Wallace System, Inc., the sum of Two Hundred Dollars ($200) within 10 days after the date hereof, which amount undersigned agrees to pay irrespective of the extent to which he may avail himself of the above mentioned services.

In the event that a like or [illegible] contract of Wallace System, Inc., [illegible] temporary closing of its quarters, the [illegible] continued start by extended a number of days [illegible] to such shut-down period.

Wallace System, Inc., agrees upon request to examine blood pressure of [illegible] for sale "but assumes no other responsibility in [illegible] to health or physical conditions of undersigned.

Signed at Chicago, Illinois, this [illegible] day of [illegible], 1929.

[illegible]

ADDRESS: [illegible]
WALLACE SYSTEM, Inc.
By [illegible]
Title [illegible]

The trial court gave judgment in favor of the plaintiff for the sum of $200.00 and costs. The defendant appealed.

The execution of the contract by the defendant and that he paid nothing under it are conceded by his counsel. The contract was in printed form except for the words, "Cash 100. Bal 30 days," which were in writing.

Upon the trial of the case, the only defense interposed by the defendant was an offer to prove a conversation between Deiss, the Vice-president of the plaintiff, and the defendant, before the execution of the contract, to the effect that the defendant was not to be obligated to take the treatments provided for in the contract, or to pay for them, unless and until he saw fit to commence taking them, and that, up to the time of the trial, he had not used the service and had no present desire so to do.

The trial court rejected the offer of proof, and properly so. Oral understandings, if any, made prior to the execution of the contract were merged in the written instrument. There was no charge of fraud or misrepresentation, and the sole contention of counsel that the court should have admitted evidence of a parol understanding is that the insertion of the words above quoted rendered the contract vague and uncertain. With this contention we cannot agree. A most cursory examination of the contract discloses that it is free from ambiguity.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

The trial court gave judgment in favor of the plaintiff for the sum of $[illegible] and costs. The defendant appealed.

The execution of the contract by the defendant and that he paid nothing under it are conceded by his counsel. The contract was in printed form except for the words, "Case 120, 2nd 30 days," which were in writing.

Upon the trial of the case, the only defense interposed by the defend it was an offer to prove a conversation between Doles, the Vice-President of the plaintiff, and the defendant, before the execution of the contract, to the effect that the defendant was not to be obligated to take the treatments provided for in the contract, or to pay for them, unless and until he saw fit to continue taking them, and that, up to the time of the trial, he had not paid for anything, nor had no reason longer to do so.

The trial court rejected the offer as immaterial, and properly so. Oral understandings, if any, made prior to the execution of the contract were merged in the written instrument. There was no charge of fraud or misrepresentation, and the mere contention of counsel that the court should have admitted evidence of a verbal understanding in that the invention of the words quoted broadened the contract rights are untenable. With this contention we cannot agree. A most cursory examination of the contract discloses that it is free from ambiguity.

The judgment of the municipal court of Chicago is, therefore, affirmed.

AFFIRMED.

FLOYD, P.J., AND PUCHTA, J., CONCUR.

255 I.A. 625

33415

MEYER L. GORDON, doing business as MEYER L. GORDON & CO.,

Defendant in Error,

v.

FRANCES R. SULLIVAN,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE HYNES delivered the opinion of the court.

On February 16, 1928, the plaintiff filed his statement of claim in the Municipal Court of Chicago, claiming a commission of $491.40 for the sale of certain real estate owned by the defendant. The latter filed an affidavit of merits and, on April 16, 1928, the parties went to trial before the court, without a jury. The court found in favor of the defendant and entered judgment upon the finding.

The record recites that on May 8, 1928, the plaintiff moved the court to "vacate order in this cause April 16, 1928" and that the hearing of the motion was postponed to May 19, 1928; that on May 19, 1928 the motion was denied; that on May 22, 1928 the plaintiff moved the court to vacate the order entered May 19, 1928, denying the motion to vacate the judgment entered April 16, 1928, and that the hearing on this motion was postponed to May 26, 1928; that on May 26, 1928, the court entered an order reciting that:

> "This cause coming on for hearing on motion of the plaintiff heretofore entered herein to vacate order entered in this cause April 16, 1928, and the court being fully advised in the premises, sustains said motion and the same is hereby vacated and set aside and for naught esteemed."

STATE

MATTHEW E. GORDON, doing business as MATTHEW E. GORDON & CO.,

Defendant in error,

v.

PEARCE M. TOMLINSON,

Plaintiff in error.

Opinion filed Jan. 8, 1930

MR. JUSTICE [illegible] delivered the opinion of the court:

On February 18, 1926, the plaintiff filed his statement of claim in the municipal court of Chicago, claiming a commission of $[illegible] for the sale of certain real estate owned by the defendant. The latter filed a stipulation of merits and, on April 15, [illegible], the matter came on to trial before the court, without a jury. The court found in favor of the defendant and entered judgment upon the finding.

The record reveals that on May 6, 1926, the plaintiff moved the court to "vacate" order in this cause entered [illegible], and that the hearing of the motion was postponed to [illegible], 1926; that on May 10, 1926 the motion was finally [illegible] on May 6, 1926 the plaintiff moved the court to vacate the order entered May 13, 1926, leaving the matter to rest on the judgment entered April 15, 1926, and that the hearing on this motion was postponed to May 20, 1926; that on May 20, 1926, the court entered an order reciting that:

> "This cause coming on for hearing on motion of the plaintiff heretofore entered herein to vacate order entered in this cause April 15, 1926, and the court being duly advised in the premises, does denie said motion and the same is hereby overruled and for naught estimated."

The court then permitted the plaintiff to take a non-suit and gave the defendant judgment for costs.

The transcript of record, although certified to be complete by the clerk of the court, does not contain any written motion, petition, affidavit or bill of exceptions.

The defendant sued out this writ of error to review the action of the trial court. The plaintiff has not filed any brief or argument.

The Municipal Court Act has fixed a period of time, i. e., thirty days subsequent to the entry of judgment, as a substitute for the common law term of court. When the thirty day period expires the Municipal Court loses jurisdiction to vacate its judgments except by petition in the nature of a bill in equity, or, in case of errors of fact, by a motion in the nature of the common law writ of error coram nobis.

The judgment appealed from was entered May 28, 1928. It recites that the cause came on to be heard upon the motion of the plaintiff to vacate the order (judgment) entered April 16, 1928, and that recital imports verity. On May 19, 1928, more than thirty days subsequent to the entry of the original judgment of April 16, 1928, the court entered an order denying the motion made May 8, 1928 to vacate the judgment. The court then lost jurisdiction to vacate the judgment, upon motion, and the judgment appealed from was beyond the jurisdiction of the court, and therefore void.

In the case of The People v. Wells, 255 Ill. 450, the identical question here presented was involved. On September 15, 1911, James W. Waber recovered a judgment in the Municipal Court

The court then permitted the plaintiff to take a non-suit and gave the defendant judgment for costs.

The procedure of recall, although entitled to be complete by the clerk of the court, does not contain any written motion, petition, affidavit or bill of exceptions.

The defendant sued out this writ of error to review the action of the trial court. The defendant has not filed any brief or argument.

The municipal court has fixed a period of time, i. e., thirty days subsequent to the entry of judgment, as a substitute for the common law term of court. When the thirty day period expires the municipal court loses jurisdiction to vacate its judgments except by petition in the nature of a bill in equity, or, in case of errors of fact, by a motion in the nature of the common law writ of error coram nobis.

The judgment appealed from was entered May 20, 1938. It receives that the cause came on to be heard upon the motion of the plaintiff to vacate the order (judgment) entered April 18, 1938, and that recall issues verily. On May 12, 1938, more than thirty days subsequent to the entry of the original judgment of April 18, 1938, the court entered an order vacating the motion made May 8, 1938 to vacate the judgment. The court then lost jurisdiction to vacate the judgment, upon motion, and the judgment appealed from was beyond the jurisdiction of the court, and therefore void.

In the case of The People v. Wise, 368 Ill. 490, the identical question here presented was involved. On September 15, 1911, James D. Wise recovered a judgment in the municipal court

of Chicago against John F. Waters. On October 14, 1911 Waters filed his motion to vacate the judgment, which was continued, and finally, on November 18, 1911, was denied. On December 14, 1911, Waters filed another motion to vacate the order entered on November 18, 1911, and also to vacate the judgment. This motion was continued, and on December 18, 1911 was granted upon Waters complying with certain conditions. The Supreme Court held that, upon the entry of the order of November 18, 1911, denying the motion to vacate, the judgment became final and could not be set aside "except upon appeal or writ of error, or by a bill in equity, or a petition containing all the essential facts to sustain such a bill."

In its opinion the court said:

> "Section 21 of the act establishing the municipal court provides that there shall be no terms, but that every judgment shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court, provided the motion to vacate, set aside or modify the same be entered in said court within thirty days after the entry of such judgment. A term of court is regarded, in law, as but one day or a unit of time, and all acts done within the term are reggrded as contemporaneous. (11 Cyc. 732). During the term in which a judgment is rendered the court retains jurisdiction to modify or vacate it or set it aside and may entertain a motion for either purpose, which may be kept alive by proper continuances until disposed of.. There are no terms of the municipal court, and the period of thirty days is substituted as the time within which the court can modify, alter or vacate a judgment or entertain a motion for that purpose. The court had jurisdiction on November 18, 1911, to act upon the motion filed on October 14, 1911, because the motion was filed within thirty days of the rendition of the judgment and was kept alive by successive continuances. If the motion had been danied by a court having stated terms the order would have been under the control of the court during the term, but as there are no terms of the municipal court, jurisdiction over the judgment was ended when the motion was denied, and a rule applicable to a court having terms could not possibly apply. Upon the denial of the motion on November, 18, 1911, the judgment became final by the express provision of section 21 that it should not thereafter be

of Chicago against John F. Waters. On October 16, 1911 Waters filed his motion to vacate the judgment, which was continued, and finally, on November 16, 1911, was denied. On December 14, 1911, Waters filed another motion to vacate the order entered on November 16, 1911, and also to vacate the judgment. This motion was continued, and on December 16, 1911 was granted upon Waters complying with certain conditions. The Supreme Court held that, upon the entry of the order of November 16, 1911, denying the motion to vacate, the judgment became final and could not be set aside "except upon appeal or writ of error, or by a bill in equity, or a petition containing all the essential facts to sustain such a bill."

In its opinion the court said:

"Section 11 of the act establishing the municipal court provides that there shall be no terms, but that every judgment shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court. Provided the motion to vacate, set aside or modify was made in the court within thirty days after the entry of such judgment. A term of court is a legal term, in law, as but one day, or a unit of time, and all acts done within the term are regarded as contemporaneous. (11 Cyc. 724). Making the term in which a judgment is rendered the court retains jurisdiction to modify or vacate it or set it aside and may entertain a motion for either purpose, which may be acted upon by proper consideration until disposed of. There are instances of the municipal court, and the action of thirty days is substituted as the time within which the court has authority, after or vacate a judgment or entertain a motion for that purpose. The court had jurisdiction on November 16, 1911, to act upon the motion filed on October 16, 1911, because the motion was filed within thirty days of the rendition of the judgment and was kept alive by continuances. If the motion had been denied by continuances, having stated some the other would have been under control of the court during the term, but as there are no terms of the municipal court, jurisdiction over the judgment was under when the motion was denied, and a true application to a court having some equity jurisdiction, upon the denial of the motion on November 16, 1911, the judgment became final by the express provision of section 11 that it should not thereafter be

subject to be set aside except upon appeal or writ of error, or by a bill in equity, or a petition containing all the essentail facts to sustain such a bill. The action of the judge in entering subsequent orders was not only contrary to the express provisions of the statute, but was contrary to the principles upon which justice is administered and the rights and interests of litigants, which require stability and finality in judgments."

The judgment of the Municipal Court of Chicago, entered on May 26, 1928, is reversed and the cause is remanded with directions to vacate said judgment.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

WILSON, P.J. AND HOLDOM J. CONCUR.

subject to be set aside except upon proof of exit of error, or by a bill in equity, or a petition containing all the essential facts to sustain such a bill. The action of the judge in entering a proposed order was not only contrary to the express provisions of the statute, but was contrary to the principles upon which justice is administered and the rights and interests of litigants, which require stability and finality in judgments."

The judgment of the municipal court of Chicago, entered on May 4, 1965, is reversed and the cause is remanded with directions to vacate said judgment.

ORDERED AND ADJUDGED.
REMANDED WITH DIRECTIONS.

KILBORN, P.J., and CORNELIUS J. CARMODY.

33440

255 I.A. 625

S. I. TARLOW,
Appellant,
v.
YO-HO PURE FOOD PRODUCTS CO.,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff recovered a judgment by confession, in the Municipal Court of Chicago, against the defendant for $1,000.00, being the principal amount due upon a promissory note, together with interest and costs. The note was dated January 18, 1928, made payable, ninety days after date, to the order of H. L. Hall, and was signed by the defendant. It was endorsed as follows:

"H. L. Hall
Belson & Lurie Account No. 1
Belson & Lurie."

The judgment was opened and the defendant given leave to plead. A trial, without a jury, was had, resulting in a finding and judgment in favor of the defendant.

It appears from the evidence that the plaintiff was a broker and financial agent employed by Belson & Lurie, a concern engaged in the produce business in the City of Chicago. His title to the note is not questioned. Hall and the defendant were engaged in the same business. Hall bought potatoes from Belson & Lurie and sold potatoes to the defendant.

The defendant gave three checks to Hall, each made payable to his order. One was for $500.00 and bore the date of April 18, 1928, the second was dated April 27, 1928, and was

Opinion filed Jan. 8, 1930

Mr. JUSTICE DYER delivered the opinion of the court.

The plaintiff recovered a judgment by confession, in the municipal court of Chicago, against the defendant for $1,000.00, being the principal amount due upon a promissory note, together with interest and costs. The note was dated January 18, 1928, made payable, ninety days after date, to the order of R. L. Hall, and was signed by the defendant. It was endorsed as follows:

"R. L. Hall
Nelson & Lurie Company, a
Nelson & Lurie."

The judgment was vacated and the defendant given leave to plead. A trial, without a jury, was had, resulting in a finding and judgment in favor of the defendant.

It appears from the evidence that the plaintiff was broker and financial agent employed by Nelson & Lurie, a concern engaged in the produce business in the City of Chicago. The title to the note is not questioned. Hall and the defendant were engaged in the "no business." Hall brought action - from Nelson & Lurie and sold interests in the note.

The defendant gave three checks to Hall, each made payable to his order. One was for $[illegible] before the date of April 18, 1928, the second was dated April [illegible], 1928, and the

for $250.00, and the third was dated April 30, 1928, and was in the sum of $365.00. Each check was endorsed as follows:

> "In payment of note due 4/18/28, H. L. Hall, Yo-Ho Pure Food Products Co., John H. Anderson, Paid 7/27/28."

It is conceded that these checks were given to Hall for the purpose of enabling him to pay the note in question, with interest, but the note was not paid by him or by the defendant.

When the checks were delivered to Hall the note was not produced, but was in the possession of Belson & Lurie, or their agent, for collection.

The defendant, in support of the judgment of the trial court, contends that there was a course of dealing between the parties in interest which was tantamount to an authorization from Belson & Lurie to the defendant to make payment of the note to Hall. With this contention we cannot agree.

Neither Belson & Lurie nor the plaintiff ever had any direct business dealings or transactions with the defendant, except in connection with the payment of the note in question. For a period of three or four years Hall bought potatoes from Belson & Lurie upon credit. He sold potatoes to the defendant and extended credit to it, during the same period. The defendant was apparently short of funds and, from time to time, gave its notes to Hall, made payable to him or his order. Hall would then endorse the notes and deliver them to Belson & Lurie. Later Hall would pay the notes either with checks of the defendant made payable to his order, or with his own checks.

for [illegible]0.00, and the third was dated April 30, 1[illegible], and was in the sum of [illegible].00. Each check was endorsed as follows:

"In payment of note due 4/15/[illegible], [illegible]. Hall.
To-do Pure Food Products Co., John [illegible]
Anderson, Paid 7/27/[illegible]."

It is conceded that these checks were given to Hall for the purpose of enabling him to say you were in question, with interest, but the note was not paid by him or by the defendant.

When the checks were delivered to Hall the note was not produced, but was in the possession of Nelson & Hurlie, or their agent, for collection.

The defendant, in support of the judgment of the trial court, contends that there was a course of dealing between the parties in interest which was sufficient to an authorization from Nelson & Hurlie to the defendant to make payment of the note to Hall. With this contention we cannot agree.

Neither Nelson & Hurlie nor the plaintiff ever had any direct business dealings or transactions with the defendant, except in connection with the payment of the note in question, for a period of three or four years [illegible] bought cattle from Nelson & Hurlie upon credit. He held notes to the defendant and extended credit to it, during the same period. The defendant was apparently short of funds but, from time to time, gave its notes to Hall, made payable to him or to the order. [illegible] would then endorse the notes and deliver them to Nelson & Hurlie. Later Hall would buy the notes back or with money of the defendant made payable to his order, or with his own checks.

If he paid with his own checks, he would later receive checks from the defendant in corresponding amounts.

It is apparent, from the course of dealing between the parties involved, that Belson & Lurie never extended any credit to the defendant; that they never accepted its notes in satisfaction of the obligations of Hall; but that the notes of the defendant were deposited with them on the understanding that Hall would meet his own obligations, either with his own checks or those of the defendant.

For the foregoing reasons the judgment of the Municipal Court of Chicago entered January 22, 1929, and vacating the judgment by confession, is reversed, and the cause is remanded ~~with directions to vacate the judgment of January 22, 1929.~~

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

WILSON, P.J. AND HOLDOM, J. CONCUR.

to enter a judgment ordering that the original judgment by confession entered November 1, 1928 stand in full force and effect as of the time of its rendition and that the plaintiffs have execution thereon.

per order of court 2-6-30

If he paid with his own checks, he would later receive checks from the defendant in corresponding amounts.

It is apparent, from the course of dealing between the parties involved, that Nelson & Lurie never extended any credit to the defendant; that they never accepted its notes in satisfaction of the obligations of Hall; but that the notes of the defendant were deposited with them on the understanding that Hall would meet his own obligations, either with his own checks or those of the defendant.

For the foregoing reasons the judgment of the Municipal Court of Chicago entered January 28, 1909, and vacating the judgment by confession, is reversed, and the cause is remanded with directions to vacate the judgment of January 22, 1909.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

SPRECH, P.J. AND HOLDOM, J. CONCUR.

33452

WILLIAM D. FITZGERALD, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
EDWARD J. McARDLE, Appellant.	)	COOK COUNTY.

255 I.A. 625

Opinion filed Jan 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

On June 3, 1927, the plaintiff brought suit in the Superior Court of Cook County to recover damages for personal injuries sustained by him, as the result of being struck by an automobile owned and operated by the defendant.

The original declaration consisted of one count, which charged negligence in general terms. Later four additional counts were filed, the first alleging wilful and wanton conduct on the part of the defendant, the second charging him with failure to have his automobile under proper control, the third alleging failure to keep a proper lookout, and the fourth charging him with failure to sound his horn or to give any warning of the approach of his automobile.

In answer to a special interrogatory submitted to them by the court, at the instance of the plaintiff, the jury found that the defendant was not guilty of wilful and wanton misconduct, as charged in the first additional count of the plaintiff's declaration. They brought in a general verdict finding the defendant guilty and assessed the plaintiff's damages at the sum of $37,500.00. Judgment was entered upon the verdict and the defendant appealed.

As to some of the facts there is no conflict. The accident happened about 2 o'clock on the afternoon of

[illegible]

WILLIAM C. LITTLEHALE,
Appellee,

v.

EDWARD G. MORGAN,
Appellant.

[illegible]

[illegible]

Opinion filed Jan 3, 1930

MR. JUSTICE RYAN delivered the opinion of the court.

On June 5, 1927, the plaintiff brought suit in the Superior Court of Cook County to recover damages for personal injuries sustained by him, as the result of being struck by an automobile owned and operated by the defendant.

The original declaration consisted of one count, which charged negligence in general terms. Under four additional counts were filed, the first alleging wilful and wanton conduct on the part of the defendant, the second charging him with failure to have his automobile under proper control, the third alleging failure to keep a proper lookout, and the fourth charging him with failure to sound his horn or to give any warning of the approach of his automobile.

In answer to a special interrogatory submitted to them by the court, at the instance of the plaintiff, the jury found that the defendant was not guilty of wilful and wanton misconduct, as charged in the first additional count of the plaintiff's declaration. Only brought in a general verdict finding the defendant guilty and assessed the plaintiff's damages at the sum of $7,000.00. Judgment was entered on the verdict and the defendant appealed.

As to some of the facts there is no conflict. The accident happened about 8 o'clock on the afternoon of

September 21, 1926, on South Western Avenue, in the City of Lake Forest. At the point in question the street was about twenty feet wide. The sky was clear and the surface of the street dry except that, according to the testimony of the defendant, there was oil on each side of the street which had leaked from the passing automobiles. The plaintiff, the operator of a laundry truck, had parked his truck on the east side of the street, facing north, while he delivered a bundle of laundry to a customer on the west side of the street. It was a north and south street. After making the delivery, the plaintiff returned to his truck and was back of it when the defendant's car struck him. He was caught between the front bumper of the defendant's car and the rear bumber of his truck, with the result that he sustained a compound comminuted fracture of the right femur above the knee and a compound fracture of the left leg between the knee and the ankle.

From the place of the accident persons, using the highway, had an unobstructed view for a distance of, approximately, half of a mile, to the north and to the south. It was a sparsely settled district. There were only three vehicles in the immediate vicinity at the time plaintiff was injured, i. e., his truck, the defendant's automobile and a Ford automobile, occupied by a man and his wife, which was southward bound on the highway in question.

The plaintiff testified that he was thirty-two years of age and married; that he had lived in Lake Forest all of his life, except for the nineteen months when he was in army service, and that he had been in the laundry business, on a commission basis, since 1923; that on the day in question he was delivering laundry along his route as he proceeded northward;

September 21, 1926, on South Western Avenue, in the City of Lake Forest. At the point in question the street was about twenty feet wide. The sky was clear and the surface of the street dry except that, according to the testimony of the defendant, there was oil on each side of the street which had leaked from the parking automobiles. The plaintiff, the operator of a laundry truck, had parked his truck on the east side of the street, facing north, while he delivered a bundle of laundry to a customer on the west side of the street. It was a north and south street. After making the delivery, the plaintiff returned to his truck and was back of it when the defendant's car struck him. He was caught between the front bumper of the defendant's car and the rear bumper of his truck, with the result that he sustained a compound comminuted fracture of the right femur above the knee and a compound fracture of the left leg between the knee and the ankle.

From the place of the accident persons, using the highway, had an unobstructed view for a distance of, approximately, half of a mile, to the north and to the south. It was a sparsely settled district. There were only three vehicles in the immediate vicinity at the time of injury. Mrs. I. E., his truck, the defendant's automobile and a Ford automobile, occupied by a man and his wife, which was southward bound on the highway in question.

The plaintiff testified that he was thirty-two years of age and married; that he had lived in Lake Forest all of his life, except for the nineteen months when he was in army service, and that he had been in the laundry business, on a commission basis, since 1922; that on the day in question he was delivering laundry along the route as he proceeded northward;

that he parked his truck immediately opposite the home of one of his customers, walked across the street with a bundle of laundry, delivered it, and then proceeded back across the street to the rear end of his truck; that when he came out towards the street, on the west parkway, he looked both ways and did not see anything within three hundred or four hundred feet; that he did not run either back of or in front of an automobile as he crossed the street and did not see either the Ford automobile going south or the automobile belonging to the defendant, until he found himself pinned in between the defendant's automobile and his own truck, and that as he proceeded across the street he did not hear or see anything coming.

The laundry truck had an enclosed body with two doors in the rear, opening outwards from the center. The plaintiff said that, when he returned to his truck, he went to the rear of it for the purpose of arranging the bundles of laundry for convenience in making future deliveries, and that he was so engaged for about thirty seconds before he was struck by the defendant's automobile.

There is much discussion in the defendant's briefs about the facts as to the direction in which the plaintiff was faced, at or just before the moment of impact, and whether he was standing or moving. There was a conflict in the evidence which presented an issue for the jury. Even if the plaintiff was facing east and was moving in that direction when the defendant first saw him, as counsel contend, it does not necessarily follow that the plaintiff was at fault, or that the defendant was not guilty of negligence. The outstanding facts are that the plaintiff's truck was parked on the extreme right of the street, facing north, and that he was directly back of it when the collision occurred.

that he parked his truck immediately opposite the home of one of his customers, walked across the street with a bundle of laundry, delivered it, and then proceeded back across the street to the rear end of his truck; that when he came out towards the street, on the west pavement, he looked both ways and did not see anything within three hundred or four hundred feet; that he did not run either back of or in front of an automobile as he crossed the street and did not see either the ford automobile going south or the automobile belonging to the defendant, until he found himself pinned in between the defendant's automobile and his own truck, and that as he proceeded across the street he did not hear or see anything coming.

The laundry truck had an enclosed body with two doors in the rear, opening outwards from the center. The plaintiff said that, when he returned to his truck, he went to the rear of it for the purpose of arranging the bundles of laundry for convenience in making future deliveries, and that he was so engaged for about thirty seconds before he was struck by the defendant's automobile.

There is much discussion in the defendant's criefs about the facts as to the direction in which the plaintiff was faced, at or just before the moment of impact, and whether he was standing or moving. There was a conflict in the evidence which presented an issue for the jury. Even if the plaintiff was facing east and was moving in that direction when the defendant first saw him, as counsel contend, it does not necessarily follow that the plaintiff was at fault, or that the defendant was not guilty of negligence. The outstanding facts are that the plaintiff's truck was parked on the extreme right of the street, facing north, and that he was directly back of it when the collision occurred.

Alfred Crittendon testified, by deposition, that he was a butler for C. J. Owens, a Lieutenant colonel in the United States regular army, stationed at Fort Sheridan, Illinois, and that his wife was employed in the same household; that on the occasion in question he, accompanied by his wife, was driving his Ford touring car south on the street on which the accident happened; that he saw the laundry truck and the approaching automobile of the defendant, but did not see the plaintiff until he heard a crash; that he walked back and saw the plaintiff lying between the two automobiles; that he backed up his automobile, which was about three car lengths away when he heard the crash, and took the plaintiff to a hospital, and that when he saw the defendant's automobile, just before the accident, it was going fifteen miles per hour and was on the east side of the street. He said that by a car length he had in mind a distance of fifteen or eighteen feet. He finally said that he was about 115 to 120 feet beyond the place of the accident when he stopped his automobile.

Lottie Crittendon testified that she was the wife of Alfred Crittendon, and was with him in the Ford automobile when the accident happened; that the laundry truck was about two blocks distant when she first saw it; that she saw the plaintiff cross the street in front of the car, in which she was riding, at a distance of ten to fifteen feet away; that when she first saw him he was about half way across the street; that when he arrived back of his truck the defendant's automobile was "right behind" him, and that when she first saw the defendant's automobile it was fifteen feet away and the car, operated by her husband, had just passed the truck. She further testified that her husband was driving at the rate of about ten miles per hour, that the defendant's car was going fifteen miles per hour, and that her husband's automobile was about two car lengths beyond the truck when she heard the crash.

Alfred Crittenden testified, by deposition, that he was a butler for U. J. Jones, a lieutenant colonel in the United States regular army, stationed at Fort Sheridan, Illinois, and that his wife was employed in the same household; that on the occasion in question he, accompanied by his wife, was driving his Ford touring car south on the street on which the accident happened; that he saw the laundry truck and the approaching automobile of the defendant, but did not see the plaintiff until he heard a crash; that he walked back and saw the plaintiff lying between the two automobiles; that he backed up his automobile, which was about three car lengths away when he heard the crash, and took the plaintiff to a hospital, and that when he saw the defendant's automobile, just before the accident, it was going fifteen miles per hour and was on the east side of the street. He said that by a car length he had in mind a distance of fifteen or eighteen feet. He finally said that he was about 120 to 130 feet beyond the place of the accident when he stopped his automobile.

Lottie Crittenden testified that she was the wife of Alfred Crittenden, and was with him in the Ford automobile when the accident happened; that the laundry truck was about two blocks distant when she first saw it; that she saw the plaintiff cross the street in front of the car, in which she was riding, at a distance of ten to fifteen feet away; that when she first saw him he was about half way across the street; that when he arrived back of the truck the defendant's automobile was "right behind him, and that when she first saw the defendant's automobile it was fifteen feet away and the car, operated by her husband, had just passed the truck. She further testified that her husband was driving at the rate of about ten miles per hour, that the defendant's car was going fifteen miles per hour, and that her husband's automobile was about ten or twelve beyond

The defendant testified that he was a lawyer, and seventy-one years of age at the time of the trial; that although he wore glasses, to correct an astigmatism, his eyesight was good; that he was driving a one-seated, three passenger cabriolet, Hudson, and was accompanied by his wife and a Mrs. Mills; that the brakes on his automobile were in good condition and that, at the place where the accident happened, the street was paved with bricks, worn smooth on each side of the oil tracks, made by the automobiles passing.

He further testified that he first saw the truck when he was two or two and a half blocks south of it, and that he was about a block or a block and a half south of the truck when he first observed the Ford automobile coming south, at a distance of two blocks, or more, north of the truck; that he saw that the Ford car was moving at a higher rate of speed than his automobile and would reach the truck first; that when the Ford car was opposite the driveway, leading into the premises where the plaintiff had delivered the bundle of laundry, he saw the plaintiff along the edge of the street, about the middle of the place where the driveway entered, apparently waiting for the Ford to pass; that he noticed that the plaintiff moved out, and the Ford automobile passed quickly, revealing the plaintiff passing right in the middle of the space which the defendant was going to drive into to pass the truck; that the rear end of the Ford automobile had passed the front end of his automobile when he observed the plaintiff at a distance of about fifteen feet back of the Ford automobile; that he immediately applied both the service and emergency brakes, but that his automobile slid twenty- to twenty-five feet until it struck the plaintiff, and he had no power over it; that, when he applied the brakes, he turned his automobile slightly to the east because it was

The defendant testified that he was a lawyer, and seventy-one years of age at the time of the trial; that although he wore glasses, to correct an astigmatism, his eyesight was good; that he was driving a one-seater, three passenger cabriolet, Hudson, and was accompanied by his wife and a Mrs. Willy; that the brakes on his automobile were in good condition and that, at the place where the accident happened, the street was paved with brick, worn smooth on each side of the oil streks, made by the automobiles passing.

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farther out in the street than the truck and he wanted to get in far enough to give the plaintiff a chance to save himself, and, that he did not have time to sound his horn, that the occupants of his automobile, including himself, screamed or "hollered", but that the plaintiff gave no heed.

The testimony of Mrs. Mills was substantially the same as that of the defendant except she said that when she saw the plaintiff in the middle of the street, moving east, he was moving as fast as he could and was stepping lively to get to his truck.

Counsel for the defendant say that, because it appeared from the evidence that there was a private driveway leading into the residence where the plaintiff delivered the bundle of laundry, he was guilty of maintaining a nuisance, by leaving his truck parked in the street. It is contended that this act on the part of the plaintiff was the proximate cause of the plaintiff's injuries or, at least, that it contributed to cause them. On this theory, three instructions were submitted and refused. In refusing to give them, the trial court did not err. The plaintiff was engaged in a lawful business and was not making an unusual or unlawful use of the highway in question. Even if he were making an unlawful use of the street, it does not necessarily follow that such use constituted negligence on the part of the plaintiff.

When the plaintiff took the witness stand he was asked by his counsel if he was married. The answer was in the affirmative. Several questions were then asked him, to which he made replies, before counsel for the defendant raised any point about it being improper to ask the plaintiff if he was married. Counsel then moved for the withdrawal of a juror and a continuance of the cause, on the ground that counsel for the plaintiff,

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When the plaintiff took the witness stand he was asked by his counsel if he was married. The answer was in the affirmative. Several questions were then asked him, to which he made replies, before counsel for the defendant objected to court about it being improper to ask the plaintiff if he was married. Counsel then moved for the withdrawal of a juror and a continuance of the cause, on the ground that counsel for the plaintiff

in his opening statement, stated to the jury that the plaintiff was a married man, and that the court had sustained an objection to the statement on the ground of its immateriality. The motion to withdraw a juror was denied.

In support of their contention that the trial court committed reversible error in this ruling, counsel have cited two decisions of the Supreme Court of this State. One of the cases is McCarthy v. Spring Valley Coal Co. 232 Ill. 473. In that case counsel for the plaintiff, in his opening statement to the jury, stated that the plaintiff had a wife and five children. An objection to the statement was interposed and sustained. In the examination of one of the witnesses, counsel asked a question which the Supreme Court considered well adapted to intimate strongly to the jury that the defendant was insured against liability for accidents of the character involved in the case. The court held that there was no justification for injecting these matters into the case, that it was obviously done for the sole purpose of prejudicing the jury, and that the error was of such a character that it could not be cured by an instruction or a remittitur. No authority, however, has been cited, holding that, in a personal injury suit, the reference, by statement or testimony, to the mere fact that the plaintiff has a wife, constitutes reversible error.

In the instant case, we might well dispose of counsels' contention, on this point, on the ground that their objection and motion to withdraw a juror came too late. We are, however, unable to perceive how the sympathies or prejudices of the jurors would be affected by the statement or proof of the mere fact that the plaintiff had a wife. A large percentage of men of the age of the plaintiff are married. In addition to that, many of them have

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In the instant case, we might well disagree with counsel's contention, on this point, on the ground that their objection to the motion to withdraw a juror came too late. We are, however, unable to perceive how the appellee is prejudiced if the jurors could be affected by the statement or proof of the mere fact that the plaintiff had a wife. A large percentage of men of the age of the plaintiff are married. In addition to that, many of them

children. These are matters of common knowledge.

After the defendant had rested his case, he was recalled to the stand by counsel for the plaintiff and asked if, at the time and just before the accident, he did not become very much confused and if he did not state to a man named Dunn and the Chief of Police of Lake Forest, a few days after the accident, that he became confused and that that was how the accident happened. His answers to these questions were in the negative. Plaintiff's counsel then called Dunn to the stand, who, over objection, testified that the defendant did state that he had become confused. The court refused to permit counsel for the defendant to show that, at the time Dunn talked to the defendant, he had a warrant for the arrest of the defendant and, that in the evening of the day on which the accident occurred, Dunn and two other police officers called at the defendant's home and threatened him with arrest unless he agreed to voluntarily appear in the Lake Forest police court. The defendant was permitted to testify that he made no statement to any of the officers about his having become confused. These rulings of the trial court, if improper or erroneous, were not of such a nature as to warrant a reversal of the judgment.

It is further contended by counsel for the defendant that the trial court erred in refusing to enter judgment in favor of the defendant under the first additional count of the declaration after the jury had made a special finding that the defendant was not guilty of wilful and wanton conduct, that the court also erred in not directing a verdict in favor of the defendant as to the first, second, third and fourth additional counts of the declaration, and that the verdict is excessive, regardless of the character of the injuries sustained, because the evidence disclosed that the plaintiff was earning $35.00

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After the defendant had rested his case, he was recalled to the stand by counsel for the plaintiff and asked if, at the time and just before the accident, he did not become very much confused and if he did not stale to a man named Lynn and the chief of police of Lake Forest, a few days after the accident, that he became confused and that that was how the accident happened. His answers to these questions were in the negative. Plaintiff's counsel then called Lynn to the stand, who, over objection, testified that the defendant did state that he had become confused. The court refused to permit counsel for the defendant to show that, at the time Lynn talked to the defendant, he had a warrant for the arrest of the defendant and, that in the evening of the day on which the accident occurred, Lynn and two other police officers called at the defendant's home and threatened him with arrest unless he agreed to voluntarily appear in the Lake Forest police court. The defendant was permitted to testify that he made no statement to any of the officers about his having become confused. These rulings of the trial court, if improper or erroneous, were not of such a nature as to warrant a reversal of the judgment.

It is further contended by counsel for the defendant that the trial court erred in refusing to enter judgment in favor of the defendant under the first additional count of the declaration after the jury had made a special finding that the defendant was not guilty of willful and wanton conduct, that the court also erred in not directing a verdict in favor of the defendant as to the first, second, third and fourth additional counts of the declaration, and that the verdict in consideration, regardless of the observer of the injurious conditions, because the evidence disclosed that the plaintiff was earning $15.00

to $40.00 per week and that the sum awarded by the jury, invested at the rate of 5% per annum, would produce an annual income of $1,375.00 and leave the principal intact. These points are without merit. McConkey v. Pennsylvania R. Co. 251 Ill. App. 399 and cases there cited.

The facts in evidence presented issues which should properly be submitted to a jury. The story told by the plaintiff was not an improbable one and the jury had a right to believe it. If they did believe it, the plaintiff was entitled to recover and it matters not that in some particulars the plaintiff was contradicted by his own witnesses. Mrs. Crittendon said that the plaintiff crossed the street about 15 feet in front of the Ford automobile and reached a place of safety behind his truck before the Ford and the defendant's automobile passed each other. The plaintiff said that he did not pass either in front or in the rear of the Ford automobile, but that he was in a place of safety thirty seconds before he was struck. Crittendon said that he never saw the plaintiff until after he was struck. Crittendon further said that he backed his car from the south to the scene of the accident. The plaintiff said that Crittendons came from the north and stopped where the plaintiff was lying between the two cars. The Crittendons testified before the plaintiff did. If the plaintiff was willing to commit perjury, it would have been to his interest, in several respects, to make his testimony accord with that given by the Crittendons.

It is finally urged that the jury awarded excessive damages. The plaintiff was about thirty years of age at the time of the accident. His earnings amounted to $35.00 or $40.00 per week. Dr. Theodore S. Proxmire attended him at the hospital. He testified that there was a compound comminuted fracture of the right femur above the knee, fragments running down into

to $40.00 per week and that the sum awarded by the jury, invested at the rate of 5% per annum, would produce an annual income of $1,372.00 and leave the principal intact. These points are without merit. Rochester v. Consolidated R. Co. 221 Ill. App. 395 and cases therein cited.

The facts in evidence represented issues which could properly be submitted to a jury. The story told by the plaintiff was not so improbable one and the jury had a right to believe it. If they did believe it, the minimum was entitled to recover and it matters not that it is also particularly the plaintiff was contributory of his own misfortune. Wm. Trittenhom said that the plaintiff crossed the street some 25 feet in front of the Ford automobile and traveled a space of ninety paces his truck before the Ford and the defendant's automobile passed each other. The plaintiff said that he did not pass either in front or in the rear of the Ford automobile, but that he was in a place of safety thirty seconds before he was struck. Trittenhom said that he never saw the plaintiff until after he was struck. Trittenhom further said that he heard the cry from the south to the scene of the accident. The plaintiff said that Trittenhom came from the north and stopped where the plaintiff was lying between the two cars. The Trittenhom testified before the plaintiff did. If the plaintiff was at fault in not getting, it could have been in the interest of a reasonable, to make his testimony accord with that given by the defendant.

It is finally urged, as the jury rendered excessive damages. The plaintiff was about thirty years of age at the time of the accident. His earnings amounted to $[illegible] per week. Dr. Dinsmore, a German attendant physician, testified. He testified that there was a condition consisting of the right femur above the knee, fragments running down into

the knee joint; that the left leg was broken, with a compound fracture between the knee and the ankle. He further testified that because of the condition, he called in a bone specialist; that the plaintiff's legs were placed into a frame with a Hodgskin splint, which is a frame made of iron with bandages swung underneath for the leg to lie in and equipped with pulleys and ropes to pull on the leg; that from September 23 to November 17, this apparatus was used with the weights on continuously; that during all of that time the plaintiff suffered such pain that he was given morphine everyday. He further testified that infection developed about the broken bones in the left leg and that the plaintiff had pneumonia for a period of ten days. He also testified that there is a twist in the left leg, a contraction of the muscles, and that these conditions will be permanent; that the plaintiff will never have any use of his right leg, that at the time of the trial the sinuses were still draining through the skin and would never clear up; that the knee is absolutely gone and that the leg should be amputated between the knee and the hip. The hospital and doctor bills amounted to, approximately, $4,000.00.

The amount of the verdict was not excessive.

For the foregoing reasons, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

the knee joint; that the left leg was broken, with a compound fracture between the knee and the ankle. He further testified that because of the condition, he confined in a cast specially; that the plaintiff's legs were placed into a frame with a Hodgkin splint, which is a frame made of iron with bandages sewed underneath for the leg to lie in and equipped with pulleys and ropes to pull on the leg; that from September 25 to November 17, this apparatus was used with the weights on continuously; that during all of that time the plaintiff suffered such pain that he was given morphine everyday. He further testified that infection developed about the broken bones in the left leg and that the plaintiff had pneumonia for a period of ten days. He also testified that there is a twist in the left leg, a contraction of the muscles, and that these conditions will be permanent; that the plaintiff will never have any use of his right leg, that at the time of the trial the sinuses were still draining through the skin and could never close up; that the knee is absolutely gone and that the leg would be lengthened between the knee and the hip. The hospital and doctor bills amounted to, approximately, [illegible].

The amount of the verdict was not excessive.

For the foregoing reasons, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

SULLIVAN, P.J. AND FELSON, J. CONCUR.

33470

255 I.A. 626

ANNA WSABLEWSKI,
Appellee,

v.

LITHUANIAN BENEFIT CLUB OF KEISTUTIS, a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff filed her statement of claim in the Municipal Court of Chicago, on November 14, 1928. She alleged that her husband died July 8, 1928; that, at the time of his death, he was a member, in good standing, of the defendant club and that, under the provisions of the by-laws of the club, she was entitled to certain death benefits aggregating the sum of $265.00.

An issue as to her husband's standing in the club was raised by the affidavit of merits.

The plaintiff took the witness stand, in her own behalf, and testified through an interpreter. Her testimony throws no light upon the only issue presented for the consideration of the trial court. She said that her husband became a member of the defendant in 1919, that she demanded payment of the death benefits and that the defendant refused to pay.

John Alexander was then called as a witness for examination under Section 33 of the Municipal Court Act. He testified that he was president and chairman of the defendant;

38470

IDA MARGARET, Appellee,	
v.	
ILLINOIS BENEFIT ASSN. A CORPORATION, Appellant.	

Opinion filed Jan. 2, 1930

MR. JUSTICE STONE delivered the opinion of the court.

The plaintiff filed her statement of claim in the Municipal Court of Chicago, on November 14, 1928. She alleges that her husband died July 1, 1928; that, at the time of his death, he was a member, in good standing, of the defendant club and that, under the provisions of the by-laws of the club, she was entitled to receive death benefits amounting the sum of $500.00.

As issue on points herein [illegible] in the club was raised by the affidavit of merits.

The plaintiff took the witness stand, in her own behalf, and testified [illegible] substance. [illegible] throws no light upon the only issue [illegible] for the consideration of the trial court. He said that her husband became a member of the association in 1924; that she [illegible] payment of the death benefits and [illegible] paid to her.

Upon cross-examination she then stated [illegible] examination under section 37 of the [illegible]. He testified that he was [illegible]

that the plaintiff's husband became a member of the club on February 4, 1928; that the defendant was the successor to an organization known as the Liberty Club; that the plaintiff's husband took over the member ship in that club of Peter Petritis, who died owing dues amounting to $1.00 for the year 1927, which the plaintiff's husband was required to pay in order to become a member of the defendant.

The defendant introduced in evidence the first and third paragraphs of Article 21 of the by-laws of the defendant which read as follows:

> "Every member of the Club shall pay to the treasury as follows: 25 cents monthly dues or three dollars ($3.00) per year. Two dollars per year to the death fund and 25 cents per year to the flower fund and automobile fund, and 25 cents to maintain the library. Dues to the death, flower and library funds shall be paid in advance."
>
> "A member who fails to pay his monthly proportional or other payments that are equal to three months in monthly dues shall have his rights suspended to the benefits in sickness, and being in arrears for dues for four months, shall not get death benefit. But all other rights shall be preserved until his elimination from the Club."

and also paragraph 5 of Article 5, providing that:

> "The death benefit shall be paid if the payments of dues of the deceased are not in arrears for four months of if there are no other dues (fines) amounting to the same sum."

The only proof of the payment of any dues by the decedent was a document, in which the entries were made by the secretary of the defendant. It showed that the only payments made were $1.00 in March and $1.00 in June of the year 1928. The first payment was credited to "Payment for Past year dues" and the other to "Death Benefit Fund."

that the plaintiff's husband became a member of the club on February 4, 1928; that the defendant was the successor to an organization known as the Liberty Club; that the plaintiff's husband took over the membership in that club of Peter Petritis, who died owing dues amounting to $1.00 for the year 1927, which the plaintiff's husband was required to pay in order to become a member of the defendant.

The defendant introduced in evidence the first and third paragraph of Article 21 of the by-laws of the defendant which read as follows:

> "Every member of the Club shall pay to the treasury as follows: 25 cents monthly dues or three dollars ($3.00) per year. Two dollars per year to the death fund and 25 cents per year to the flower fund and automobile fund, and 25 cents to maintain the library. Dues to the death, flower and library funds shall be paid in advance."
>
> "A member who fails to pay his monthly proportional or other payments that are equal to three months in monthly dues shall have his rights suspended to the benefits in sickness, and being in arrears for dues for four months, shall not get death benefit. But all other rights shall be preserved until his elimination from the Club."

and also paragraph 3 of Article 5, providing that:

> "The death benefit shall be paid if the payments of dues of the deceased are not in arrears for four months or if there are no other dues (fines) amounting to the same sum."

The only proof of the payment of any dues by the deceased was a document, in which the entries were made by the secretary of the defendant. It showed that the only payments made were $1.00 in March and $1.00 in June of the year 1928. The first payment was credited to "Payment for first year dues" and the other to "Death benefit fund."

There is no evidence in the record showing, or tending to show, that the decedent, or any one representing him, directed or requested the defendant to apply these payments in any other manner, or that they were improperly applied.

From the foregoing it appears that the decedent was not a member, in good standing of the defendant club, at the time of his death, so as to entitle the plaintiff to recover the amount provided by the by-laws as a death benefit.

The case was tried by the court, without a jury, resulting in a finding in favor of the plaintiff and a judgment upon the finding.

For the foregoing reasons, the judgment of the Municipal Court of Chicago is reversed and judgment for costs entered here in favor of the defendant.

JUDGMENT REVERSED AND JUDGMENT FOR COSTS HERE IN FAVOR OF THE DEFENDANT.

WILSON, P.J. AND HOLDOM, J. CONCUR.

There is no evidence in the record showing, or tending to show, that the decedent, or any one representing him, directed or requested the defendants to apply these payments in any other manner, or that they were improperly applied.

From the foregoing it appears that the decedent was not a member, in good standing of the defendant club, at the time of his death, so as to entitle the plaintiff to recover the amount provided by the by-laws in a death benefit.

The case was tried by the court, without a jury, resulting in a finding in favor of the plaintiff and a judgment upon the finding.

For the foregoing reasons, the judgment of the Municipal Court of Chicago is reversed and judgment for costs entered here in favor of the defendant.

JUDGE, P.J. AND MCGOOEY, J. CONCUR.

33479

McKEY & POAGUE, Inc.,
a Corporation,

Appellant,

v.

SAM KRISOLOFSKY,

Appellee,

APPEAL FROM

255 I.A. 626

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

This was a proceeding in the Municipal Court of Chicago to recover a commission for the sale of real estate, resulting in a directed verdict in favor of the defendant at the close of the plaintiff's case.

The representative of the plaintiff, who conducted the negotiations for sale, testified that he had all of his dealings with the defendant's wife and that he never saw or talked to the defendant. There was no offer of any evidence showing that the defendant ever authorized his wife, either orally or in writing, to act as his agent, or even that he had any knowledge of the endeavors of the plaintiff to sell his property.

The plaintiff relies solely upon the affidavit of merits, filed on behalf of the defendant to establish the relationship of agency. The affidavit was on a printed form used in the Municipal Court and stated that the affiant, Ida Krisolofsky, was the duly authorized agent of the defendant

STATE

LOEBY & LOEBY, Inc.,
a Corporation,

Appellant,

vs.

TAM KINOLOFSKY,

Appellee.

Appeal from
Municipal Court
of Chicago.

Opinion filed Jan. 3, 1930

MR. JUSTICE BRIEL delivered the opinion of the court.

This was a proceeding in the Municipal Court of Chicago to recover a commission for the sale of real estate, resulting in a directed verdict in favor of the defendant at the close of the plaintiff's case.

The representative of the plaintiff, who conducted the negotiations for sale, testified that he had all of his dealings with the defendant's wife and that he never saw or talked to the defendant. There was no offer of any evidence showing that the defendant ever authorized his wife, either orally or in writing, to act as his agent, or even that he had any knowledge of the endeavors of the plaintiff to sell his property.

The plaintiff relies solely upon the affirmative merits, filed on behalf of the defendant in the trial, the relationship of agency. The plaintiff was a private land broker in the municipal court and claims that the defendant, Tam Kinolofsky, was the only authorized agent of the defendant

and had personal knowledge of the facts "in the above entitled cause." This was followed by a denial that the defendant ever listed the property in question with the plaintiff or agreed to pay to the plaintiff any commission. It may well be that the defendant's wife was his agent for the purpose of executing the affidavit of merits but, from that fact, there arises no presumption that she was his agent for the purpose of employing a broker in his behalf.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

and had personal knowledge of the facts "in the above entitled cause." This was followed by a denial that the defendant ever listed the property in question with the plaintiff or agreed to pay to the plaintiff any commission. It may well be that the defendant's wife was his agent for the purpose of executing the affidavit of merits but, from that fact, their orders no presumption that she was his agent for the purpose of employing a broker in his behalf.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

33506

GUST PAPPAS,

Plaintiff in Error,

v.

JOHN E. RECKRODT and ELENORE RECKRODT,

Defendants in Error,

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

255 I.A. 626

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

This writ of error brings here for review a decree of the Circuit Court of Cook County, in a proceeding to compel specific performance of a contract for the sale of land. The transcript of record is encumbered with copies of the original bill of complaint, an amended and supplemental bill, an amendment to the bill, and a pleading entitled, "amended bill to the amended bill of complaint." These pleadings were all superseded, by an amended bill of complaint, subsequently filed.

To the latter pleading answers were filed, in which the material allegations of the bill were denied. The cause was referred to a Master in Chancery who reported to the court, recommending that specific performance should not be granted but that the complainant should be awarded damages. The Chancellor sustained exceptions to the report and dismissed the amended bill of complaint for want of equity.

[illegible]

COUNT PARKER,

Plaintiff in Error,

v.

JOHN E. MACKNOT and ELEANOR MACKNOT,

Defendants in Error.

[illegible]

[illegible]

[illegible]

Opinion filed Jan. 2, 1920

MR. JUSTICE ATKER delivered the opinion of the court.

This writ of error brings here for review a decree of the Circuit Court of Cook County, in a proceeding to compel specific performance of a contract for the sale of land. The transcript of record is accompanied with copies of the original bill of complaint, an amended and supplemental bill, an amendment to the bill, and a pleading entitled, "amended bill to the amended bill of complaint." These pleadings were all superseded, by an amended bill of complaint, demurrer filed.

On the latter pleading answers were filed, in which the material allegations of the bill were denied. The cause was referred to a master in chancery who reported to the court, recommending that a decree be entered that it appeared that the complainant should be entitled to the amended bill of complaint. The Chancellor sustained exceptions to the report and dismissed the amended bill of complaint for want of equity.

The Master reported that he had taken the testimony of witnesses and that he had returned a transcript of their testimony to the court as a part of his report. But a copy of the transcript of testimony is not abstracted nor is it to be found in the transcript of record. We have nothing before us except the pleadings, the Master's Report of his findings of fact and conclusions of law, certain documents purporting to be exhibits but not identified as having been received in evidence, and the decree of the trial court.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

The master reported that he had taken the testimony of witnesses and that he had returned a transcript of their testimony to the court as a part of his report. But a copy of the transcript of testimony is not substantial nor is it to be found in the transcript of record. We have nothing before us except the pleadings, the master's report of his findings of fact and conclusions of law, certain documents purporting to be exhibits but not identified as having been received in evidence, and the decree of the trial court.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

WILSON, P.J., and McGLOON, J., concur.

33539

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

M. SOLOMON,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Jan. 2, 1930

MR. JUSTICE RYNER delivered the opinion of the court.

An action in debt was instituted in the Municipal Court of Chicago in the name of the People of the State of Illinois, at the instance of the Illinois Department of Agriculture, against the defendant. The proceeding was for the recovery of a fine for a violation of Section 24 of the Illinois Dairy and Food Statute, which reads as follows:

> "No person shall within this state, manufacture for sale, have in his possession with intent to sell, offer or expose for sale, or sell, as lard, any substance not the legitimate and exclusive product of the fat of the hog."

Section 6 of the same act provides, in part, as follows:

> "Whoever shall have possession or control with intent to sell of any food which violates any of the provisions of this Act shall be held to have known the true character, quality and name of such food."

The State had the right to appeal, as the original action was a civil one. People v. Milwaukee Dairy Co. 244 Ill. App. 341.

Proof of intent to violate the law was not necessary, under the express provisions of the statute. Lack of knowledge of the violation of the law afforded no excuse. City of Chicago v. Bowman Dairy Co., 334 Ill. 284.

People ex rel.	Cook Count
Appellant,	
v.	Superior Court
H. Hodgson,	
Appellee.	of Appeals.

Opinion filed Jan. 8, 1930

MR. JUSTICE CLARK delivered the opinion of the court.

An action in debt was instituted in the municipal Court of Chicago in the name of the people of the State of Illinois, at the instance of the Illinois Department of Agriculture, against the defendant. The proceeding was for the recovery of a fine for a violation of section 6 of the Illinois Dairy and Food Institute, which reads as follows:

> "No person shall within this state, manufacture for sale, have in his possession with intent to sell, offer or expose for sale, or sell, in part, any substance not the legitimate and exclusive product of the fat of the cow."

Section 8 of the same act provides, in part, as follows:

> "Whoever shall have possession or control with intent to sell of any food which violates any of the provisions of this act shall be held to have sold the same unless, upon request, quality and name of such food."

The State had the right to sue, as the original action was a civil one. People v. Illinois Cent. R. R. Co. 244 Ill. 1, 7.

Proof of intent to violate the law was not necessary, under the express provisions of the statute. Proof of the violation of the law is sufficient to prove. City of Chicago v. Bowman Dairy Co., 251 Ill. 98.

The appellee has failed to file any brief or argument.

The evidence discloses that a state inspector purchased from the defendant a pound of lard, represented to be pure, and that upon analysis the commodity purchased was found to contain three to five per cent of beef fat.

The trial court appeared to be of the opinion that the offense was of such a trivial nature as not to warrant the imposition of a fine against the defendant. Counsel for the State insists that the principal involved is of paramount importance and that, at least, a minimum fine should have been imposed. With the latter contention we agree.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

JUDGMENT REVERSED AND
CAUSE REMANDED.

WILSON, P.J. AND HOLDOM, J. CONCUR.

The appellee has failed to file any brief or argument.

The evidence discloses that a chief impounded a [illegible] chased from the defendant's pound of land, purported to be pure, and that upon analysis the commodity in question was found to contain shrub to five per cent of beef fat.

The trial court appeared to be of the opinion that the offense was of such a trivial nature as not to warrant the imposition of a fine against the defendant. Assuming for the sake argument that the principal involved is of consequence and that, at least, a minimum fine should have been imposed, with the latter contention we agree.

The judgment of the municipal court of Chicago is reversed and the cause is remanded.

[illegible]
[illegible]

[illegible], P. J., and [illegible], J., concur.

33214

255 I.A. 627

MILLARD R. POWERS and WILBUR F. POWERS, Appellants,	APPEAL FROM
v.	
ARTHUR N. POWERS, SAMUEL INSULL, COMMONWEALTH EDISON CO. PUBLIC SERVICE CO. OF NORTHERN ILLINOIS, ILLINOIS LIGHT & POWER CO., CENTRAL TRUST CO. OF ILLINOIS, JOHN E. ETZKORN, HELEN E. MOORE, EDWARD M. BULLARD, BEN H. MATTHEWS, CHARLES H. SEEBERGER, and EDWIN D. BUELL, Trustee of the Estate of Arthur N. Powers, Bankrupt, Appellees.	SUPERIOR COURT COOK COUNTY.

Opinion filed Jan. 2, 1930

STATEMENT BY THE COURT

As said in Babcock v. Farwell, 146 Ill. App. 307.

> *** In the conclusions to which we have arrived we do not deem it necessary or desirable to advert to all the varied matters appearing in the pleadings, or to discuss all the law or answer the whole of the argument projected into the cause by the briefs. We shall content ourselves in the statement which here follows by limiting it to such facts as are, in our opinion, sufficient to an adequate understanding of the cause and potent to our decision, and shall in our opinion touch only upon such legal questions conclusive, in our judgment, to determine the rights involved upon the facts so appearing."

On July 9, 1927, the original bill was filed, and on October 18, 1927, the amended bill was filed, and on March 9, 1928, a supplemental bill was filed.

All of the defendants interposed a general and special demurrer to the bill, the amended bill and supplemental bill, in which several demurrers it was averred in substance, inter alia, that the complainants had not stated such a case as

[illegible]

[illegible] G. [illegible] and [illegible]
T. [illegible],

appellants,

v.

ANTHONY S. [illegible],
SAMUEL [illegible],
[illegible] TRUSTS CO.
[illegible] SERVICE CO. OF WASHINGTON [illegible],
[illegible] YORK & [illegible] CO.,
CENTRAL TRUST CO. OF ILLINOIS,
JOHN S. [illegible],
[illegible] S. [illegible],
EDWARD W. [illegible],
[illegible] T. [illegible],
[illegible] H. [illegible], and
EDWIN [illegible], Trustee of the [illegible]
of Arthur S. [illegible], Bankrupt,

appellees.

Opinion filed Jan. 8, 1930

[illegible] BY [illegible]

[illegible] Mr. [illegible] [illegible], [illegible] [illegible], 1927.

"... In the conclusions to which we have arrived we do not deem it necessary or desirable to advert to all the vitiated matters appearing in the pleadings, or to discuss all the law or answer the mass of the [illegible] injected into the cause by the briefs. We do not consider ourselves in the statement which here follows by limiting it to such facts as are, in our opinion, sufficient to an adequate understanding of the issues and extent to our decision, and so it is a [illegible] touch only upon such legal questions [illegible] our judgment, to determine the rights involved upon the issue as presented.

On July 9, 1917, the original bill was filed, and on [illegible] 18, 1917, the amended bill was filed, and on [illegible] 1918, a supplemental bill was filed.

All of the defendants interposed [illegible] demurrer to the bill, the amended bill and [illegible] in which novel questions arose it was evident [illegible] said, that the complainants had not stated [illegible]

entitled them, in a court of equity, to any discovery or relief, etc; that the amended bill was multifarious, and that complainants had not made out any title to any of the relief prayed.

On November 8, 1938, all of the demurrers were sustained and the complainants electing to stand by their said bills, the same and each of them were dismissed for want of equity with costs, etc., and complainants bring the record to this court for review by appeal.

The errors assigned and argued are environed within the assignment that the chancellor erred in sustaining the several demurrers and in dismissing the several bills above recited for want of equity.

Note that throughout the pleadings the dates and most of the sums of money mentioned are made under a videlicet.

In the several bills it is averred inter alia:

That on January 2, 1905, the complainant, Millard M. Powers, and the defendant, Arthur N. Powers, under the firm name of Arthur N. Powers & Co., embarked in an enterprise to build and operate one or more hydro electric power plants in Kankakee and Will Counties, Illinois, on the Kankakee River about 15 miles below Kankakee, and with the purpose of acquiring and operating electric, gas and water plants supplying local requirements in certain of the environing municipalities, and to acquire, construct and operate public utility properties and interurban electric railways favorably located for consumption of such generated electric power.

In September, 1908, the foregoing partnership employed one of the complainants, Wilbur F. Powers, as a civil engineer,

entitled them, in a court of equity, to any discovery or relief, etc; that the amended bill was multifarious, and that complainants had not made out any title to any of the relief prayed.

On November 8, 1922, all of the demurrers were sustained and the complainants electing to stand by their said bills, the same and each of them were dismissed for want of equity with costs, etc., and complainants bring the record to this court for review by appeal.

The errors assigned and argued are analyzed within the assignment that the chancellor erred in sustaining the several demurrers and in dismissing both texas-bill above recited for want of equity.

Note that throughout the pleadings the dates and most of the sums of money mentioned are more under a violation.

In the several bills it is averred later that:

That on January 2, 1909, the complainant, William [illegible] Powers, and the defendant, Arthur E. Powers, under the firm name of Arthur E. Powers & Co., embarked in an enterprise to build and operate one or more hydro electric power plants in Kanawha and Gill counties, Illinois, on the Kanawha River about 12 miles below Kanawha, and with the purpose of acquiring and operating electric, gas and water plants supplying local requirements in certain of the surrounding municipalities, and to acquire, construct and operate public utility properties and interurban electric railways favorably located for connection of such generated electric power.

In September, 1909, the forbearing partnership employed one of the complainants, William J. Powers, as a civil engineer,

and aside from the payment of his fixed salary, he was to have a one-fifth interest in the enterprise. This one-fifth financial interest was fixed by an agreement between the said three Powers in February 1907, and that in accord therewith from September 1908 until February 1911 said Wilbur F. Powers gave his whole time to the Power firm, as civil engineer.

That between 1905 and 1909 the Powers firm " at great labor and expense acquired equipment, maps, plats, profiles and engineering data, including, in 1909, a complete topographical survey of said Kankakee River from the point where said Kankakee and Desplaines Rivers join to form the Illinois River and thence up said Kankakee River for fifty miles to a point where said Kankakee River crosses the state line between Illinois and Indiana;" also during said period the Powers partnership secured written options for valuable considerations paid and undertaken to be paid, upon certain lands on the Kankakee River running for a period of years (including an option on a so-called David Jay property of some one to two acres and a so-called Church Todd property of some nineteen acres) and upon a water plant and a gas plant, (at a price of $200,000)and an electric light plant (at a price of $400,000) operating in Kankakee.

That from time to time "to-wit January 2, 1906 to January 2, 1909", Millard R. and Arthur N. Powers advised Insull of their field of operation and that Insull stated that he was not and would not be interested in any hydro-electric plants or interurban railroads outside of Chicago; that on March 1, 1910, Insull informed Powers & Company that he was affiliated with one Baker in generating or selling electric energy in Joliet, Blue Island and Chicago Heights, and that if the Powers firm entered into operation there, Insull and his associates would immediately

and aside from the payments of his first salary, to be [illegible] a one-fifth interest in the enterprise. This one-fifth financial interest was fixed by an agreement between the said [illegible] in February 1907, and that in accordance therewith from September 1906 until February [illegible] said [illegible] gave his whole time to the [illegible] firm, as [illegible].

That between 1906 and 1907 the [illegible] firm [illegible] great labor and expense acquired [illegible], [illegible], plans, profiles and engineering data, including, in 1906, a [illegible] topographical survey of said Kankakee River from the point where both Kankakee and Desplaines Rivers join to form the Illinois River and thence up said Kankakee River for fifty miles to [illegible] Kankakee River crosses the state line between Indiana and Illinois; also during said period [illegible] secured written options for valuable [illegible] and undertaken to be paid, upon certain lands on said Kankakee River covering for a period of years (including in [illegible]) [illegible] property of some [illegible] property of some [illegible] gas plant, (at a price of $[illegible],000) and an electric light plant (at a price of [illegible]) [illegible], in Kankakee.

That from time to time [illegible] January 2, 1906 to January 2, 1910, [illegible] of their field of operation and that [illegible] stated [illegible] not and could not be interested in any [illegible] interurban railroads outside of Chicago; that on March 1, 1909, Insull informed [illegible] Company that he was affiliated with [illegible] Baker in generating or selling electric energy in [illegible] Joliet and Chicago Heights, and that if the [illegible] into operation there, Insull [illegible]

kill off the Powers firm project and offered to make " a gentleman's agreement" not to enter any fields in which the Powers firm were operating in consideration of a reciprocal agreement by them not to enter Chicago Heights or any portion of the field in which Insull was interested and to give Insull the first opportunity to purchase any excess electric energy generated pursuant to said firm's project and not required by them, which offer and proposed agreement said Powers firm then and there accepted and agreed to; that about June 1911 Powers and Company closed a written contract with Spencer, Trask & Company, bankers, by which it obligated itself to purchase from Powers and Company, at ninety per cent on the dollar, $10,000,000 par value bonds of Illinois Light and Power Company organized by the Powers January 6, 1910; that shortly thereafter, on to-wit; June 15, 1911, at the City of New York, Insull learned of the Trask contract, and thereupon he then and there unlawfully and fraudulently entered into a conspiracy with one Gwyre ("whose full name is unknown to your orators") and others unknown, unlawfully and fraudulently to prevent Powers & Company from carrying out and successfuly prosecuting their project in whole or in part; that pursuant thereto on June 16, 1911, Insull induced one A. S. Maltman to sell to him the electric light plant operating in Kankakee upon which the Powers Company had an option of purchase, for $1,300,000; that thereafter on June 16, 1911, pursuant to the aforesaid conspiracy Insull and his co-conspirators unlawfully and fraudulently induced the owner of the gas plant at Kankakee (whose name complainants do not recall), from whom, as Insull then and there well knew, the Powers firm had a legal and binding option of purchase, to sell the same to the Public Service Co. of Northern Illinois for $300,000; that on June 17, 1911, in the line of such conspiracy

full of the Power Firm project and offered to make a
gentlemen's agreement not to enter any field in which the
Power Firm were operating in consideration of a reciprocal
agreement by them not to enter Chicago markets or any portion
of the field in which Insull was interested. In fact Insull
the first opportunity to purchase any Power electric energy
generated potential to Insull Firm's property, not for resale by
them, which offer and proposed agreement with Power Firm when
and there accepted and agreed to; that about June 1911 Power
and Company signed a written contract with Insull, Insull &
Company, whereby, by which it only itself to purchase from
Power and Company, at nominal net cost on the dollar, 10,000,000
par value bonds of Illinois Light and Power Company organized
by the Power January 6, 1911; that shortly thereafter, on
to-wit; June 19, 1911, at the call of the Power, Insull learned
of the Insull contract, and in reason by them was there unlawfully
and fraudulently entered into a conspiracy with Power
("whose full name is unknown to plaintiff") and others unknown,
unlawfully and fraudulently to prevent Power & Company from
carrying out and successfully accomplishing their project in which
or in part; that unknown also to June 19, 1911, Insull
induced one C. R. Cushman to sell to him the Illinois Light
plant operating in Kankakee upon which the Power Company had
an option of purchase, for $[illegible], and; that thereafter on June
19, 1911, pursuant to the aforesaid conspiracy, Insull and his
co-conspirators unlawfully and fraudulently induced the Power
of the pre-limit of Kankakee (whose name plaintiff is not
recall), from whom, as Insull, then and there knew and knew, the
Power Firm had a legal and binding option of purchase, to sell
the same to the Public Service Co. of Northern Illinois for
$200,000; that on June 19, 1911, in the line of the conspiracy

Insull informed Spencer, Trask & Company that he had acquired said gas and electric plants, and "as your orators are informed and believe and charge the fact to be" that Insull would be the financial ruin of Spencer Trask & Company if it proceeded in any manner to aid the Powers firm's project; that Insull well knew that those gas and electric light plants were necessary and an essential part of the Powers project; that their ownership and control was part of the terms of the contract with Spencer Trask & Company, and that the same would have been a source of large immediate income, $75,000 per year, the largest source of income to cover carrying charges during the period of construction; that by reason of such conspiracy upon the part of Insull, on June 18, 1911, Spencer Trask & Company refused to proceed further with the performance of their contract to sell the $10,000,000 of bonds above mentioned, to the damage of the Powers firm of $1,000,000; that on August 7, 1911, Insull promised and agreed to purchase from complainants and Arthur N. Powers, in consideration and settlement of the injury and damage wrongfully done complainants and defendant Arthur N. Powers, "or said Illinois Light and Power Co." or such other corporate entity as might be created by the Powers firm for such purpose, all of the electrical energy generated at said proposed hydro electric plant for fifty years and pay therefor a price less than the cost of steam produced electric energy, which would produce earnings sufficient to yield to the owners a fair, just and reasonable return upon the money required to be expended and invested in the site and in the building of the hydro-electric power plant and agreed promptly to reduce such agreement into a written contract, so that the Powers firm might use such contract as a basis for financing construction of the foregoing plant; that Insull would not interfere in the

Insull informed Spencer, Trask & Company that he had acquired said gas and electric plants, and "as your clients are informed and believe and charge the fact to be" that Insull would be the financial main of Spencer Trask & Company if it succeeded in any manner in aid the Torrey firm's project; that Insull well knew that these gas and electric light plants were necessary and an essential part of the Torrey project; that Insull shall consent, and control the part of the terms of the contract with Spencer Trask & Company, and that the same would have been a source of large immediate income, "[illegible] per year, the largest source of income to cover carrying charges during the period of construction; that by reason of such connection upon the part of Insull, on June 16, 1911, Spencer Trask & Company refused to proceed further with the performance of their contract to sell the [illegible] of bonds above mentioned, to the Empire of the Torrey firm of [illegible] [illegible] at [illegible] 7, 1911, Insull promised and agreed to which he from [illegible] and return [illegible] Towers, in consideration and satisfaction of the injury and damage accordingly made complainants and defendant [illegible] Torrey, for said Illinois [illegible] over [illegible] other corporate utility [illegible] be [illegible] by the Torrey firm for such purpose, all of the [illegible] energy [illegible] hydro electric [illegible] fifty year [illegible] [illegible] less than the cost of [illegible] electric energy, which would produce a single multiplex [illegible] to the [illegible] just and reasonable return upon the money required to be expended and invested in the site and in the building of the hydro-electric power plant and [illegible] [illegible] agreement into a written contract, so that the Torrey firm might use such contract as a basis for the [illegible] of the foregoing plant; that Insull could not participate in the

financing, building, development or operation of such plant by the Powers firm.

On August 10, 1911, in reliance on the alleged contract of August 9, 1911, upon the suggestion of Insull, Powers & Company, at a cost of about $20,000 directed Sanderson & Porter, engineers, to report necessary engineering data to determine the cost of the proposed hydro electric plant, and to secure options upon further purchases of lands necessary in the erection and operation of the aforesaid plant. About the same time the three Powers took up the matter of the preparation of a formal written agreement with them on the one hand and on the other one Buell McKeever, who is alleged to have been the attorney of Insull. On June 1, 1912, Sanderson & Porter completed their report, which was submitted to Insull; that in May, 1915, there was submitted to Insull another detailed report with estimate by Sanderson & Porter, of the cost of the proposed hydro electric power plant, prepared at the expense of the three Powers, which was done at the request of Insull, after the making of certain borings and maps prepared by complainant Wilbur F. Powers in about 1914; that the relative cost of hydro electric power and coal produced electric power in 1912, as indicated by the report of Sanderson & Porter, was not substantially different, when on August 9, 1911 Insull made the averred contract of that date; that commencing in 1914, except for a short period of six months in 1913, when there was a sharp decline in the cost of coal, the relative cost of coal-produced electric energy had steadily increased, and the cost of hydro electric energy had declined during the times mentioned in the bill; that during the same period it is true that owing to general conditions, cost of labor, material, etc., the actual cost of hydro electric power had steadily increased, while at the same time the cost of coal produced electric energy had

financing, building, development or operation of such plant by the Power Firm.

On August 10, 1911, in reliance on the alleged contract of August 9, 1911, upon the suggestion of Insull, Power & Company, at a cost of about $80,000 directed Sanderson & Porter, engineers, to report necessary engineering data to determine the cost of the proposed hydro electric plant, and to secure options upon further purchases of lands necessary in the erection and construction of the aforesaid plant. About the same time the three Power Firm got up the matter of the preparation of a formal written agreement with them on the one hand and on the other one Insull. However, who is alleged to have been the attorney of Insull. On June 1, 1912, Sanderson & Porter completed their report, which was submitted to Insull; that in May, 1913, there was submitted to Insull another detailed report with estimate by Sanderson & Porter, of the cost of the proposed hydro electric power plant, regarding the expense of the three Power, which was done at the request of Insull, after the making of certain borings and were prepared by complainant Gibbs. Power in about 1914; that the relative cost of hydro electric power and coal produced electric power in 1913, as indicated by the report of Sanderson & Porter, was not substantially different, when on August 9, 1911 Insull made the averred contract of that date; that continuing in 1914, except for a short period of six months in 1914, when there was a marked decline in the cost of coal, the relative cost of coal-produced electric energy had steadily increased, and the cost of hydro electric energy had declined during the time mentioned in the bill; that during the same period it is true that owing to general conditions, cost of labor, material, etc., the actual cost of hydro electric power had steadily increased, while at the same time the cost of coal produced electric energy had

increased more so; that on August 9, 1911, and at all times since, as mentioned in the bill, there has been an ascertainable price of hydro electric energy less than the cost of steam produced electric energy, which it is averred could be paid by Insull to the three Powers for the electric energy generated at the hydro electric plant, which would produce earnings sufficient to yield to its owners a fair return upon the money reasonably required to be expended and invested in the building and operation of said hydro electric plant; that by about January 2, 1913, all of the engineering data, furnished by Sanderson & Porter at the suggestion of Insull, was prepared and available, and the memorandum of agreement had been completed and approved by Buell McKeever, except for the insertion therein, when definitely determined, of the exact price to be paid thereunder for hydro electric energy; that thereafter in February, 1913, the capital stock of the Illinois Light and Power Company, which had been organized under the laws of Illinois by Powers & Company about January 1910, was increased to $1,000,000 and the Powers Company was authorized to issue $2,500,000 long time bonds, contemplated to be sold to raise additional funds to construct the hydro electric plant; that on June 1, ~~1985,~~ 1913 in the course of Millard R. And Arthur N. Powers' activities in procuring additional options on additional land, it came to the knowledge of Millard R. and Arthur N. Powers that Insull, pursuant to an alleged conspiracy, had permitted one Charles A . Monroe who had joined the conspiracy to engage in unlawfully and fraudulently attempting to induce owners of land necessary to the construction and operation of said hydro electric plant, to violate such owners' legal options to complainants and Arthur N. Powers, and sell their lands to the conspirators or some of them; and Charles A. Monroe, pursuant to such conspiracy

increased more so; that on August 8, 1911, and at all times since, as mentioned in the bill, there has been an ascertainable price of hydro electric energy less than the cost of steam produced electric energy, which it is averred could be paid by Insull to the three Powers for the electric energy generated at the hydro electric plant, which would produce earnings sufficient to yield to its owners a fair return upon the money reasonably required to be expended and invested in the building and operation of said hydro electric plant; that by about January 2, 1912, all of the engineering data, furnished by Sanderson & Porter at the suggestion of Insull, was prepared and available, and the memorandum of agreement had been completed and approved by Insull Whatever, except for the insertion therein, when definitely determined, of the exact price to be paid thereunder for hydro electric energy; that thereafter in February, 1912, the capital stock of the Illinois Light and Power Company, which had been organized under the laws of Illinois by Powers & Company about January 1910, was increased to $1,000,000 and Powers Company was authorized to issue $[illegible],000,000 long time bonds, contemplated to be sold to raise additional funds to construct the hydro electric plant; that on June 1, [illegible], in the course of William H. and Arthur R. Powers' activities in procuring additional options on additional land, it came to the knowledge of William H. and Arthur R. Powers that Insull, pursuant to an alleged conspiracy, had persuaded one Charles E. Monroe who had joined the conspiracy to engage in unlawfully and fraudulently attempting to induce owners of land necessary to the construction and operation of said hydro electric plant, to violate such owners' legal options to convey land to Arthur R. Powers, and sell their land to the corporation or some of them; and Charles A. Monroe, pursuant to such conspiracy

unlawfully and fraudulently induced the owner of the David Jay property under option to the complainants, and the owner of the so-called Churdh Todd property, also under option to the complainants, to sell the properties to the conspirators or some of them; that about the same time, pursuant to such conspiracy they caused to be represented to other owners of other similar lands, also under legal option to complainants and Arthur N. Powers, that if they would not break their options and sell their lands to the conspirators, Insull would not permit the construction or development of the hydro electric plants for at least ten years; that on August 9, 1913, Insull promised Powers & Company that he would cause the Jay and Todd properties to be immediately conveyed to the Illinois Light and Power Company; that up to July 10, 1926, however, such had not been done; that on August 9, 1913, it was represented to Insull that the agreement prepared by McKeever contemplated a 50 foot dam, and that Insull approved the erection of said dam pursuant to the alleged conspiracy, and represented that before determining the price for hydro electric power to be paid by Insull and executing the aforesaid memorandum of agreement, Insull desired to consult further with the engineers; that from August 9, 1913, until some time in December, 1913, active prosecution by Powers & Company and the Illinois Light and Power Company of the building of the contemplated hydro electire plant at Kankakee consisted practically wholly in efforts to bring Insull to the point of finally approving a definitely fixed and determined price to be paid by Insull for such output of said plant, and executing an agreement pursuant to the agreement of August 9, 1911; that during the aforesaid period Insull, pursuant to the alleged conspiracy, was from time to time putting off the complainants on divers excuses for the purpose, by such delays, of depressing

unlawfully and fraudulently induced the owner of the David Jay property under option to the complainants, and the owner of the so-called Church Road property, also under option to the complainants, to sell the properties to the conspirators or some of them; that about the same time, pursuant to such conspiracy they caused to be represented to other owners of other similar lands, also under legal option to complainants and Arthur B. Towers, that if they would not renew their options and sell their lands to the conspirators, Insull would not permit the construction or development of the hydro electric plants for at least ten years; that on August 8, 1912, Insull promised Towers & Company that he would cause the David Jay and Ford properties to be immediately conveyed to the Illinois Light and Power Company; that up to July 10, 1916, however, such had not been done; that on August 8, 1912, it was represented to Insull that the agreement prepared by McKeever contemplated a 50 foot dam, and that Insull approved the erection of said dam pursuant to the alleged conspiracy, and represented that before determining the price for hydro electric power, to be paid by Insull and measuring the aforesaid measurements of agreement, Insull desired to consult further with the conspirators; that from August 8, 1912, until some time in December, 1912, active prosecution by Towers & Company and the Illinois Light and Power Company of the building of the contemplated 5 foot electric plant at Kankakee constituted practically wholly in efforts to bring Insull to the point of finally approving a definitely fixed and determined price to be paid by Insull for such output of said plant, and executing an agreement pursuant to the agreement of August 8, 1912; that during the aforesaid period Insull, pursuant to the alleged conspiracy, was from time to time putting off the complainants on diverse excuses for the purpose, by such delays, of damaging

and adversely influencing the minds of complainants and Arthur N. Powers successfully to prosecute said enterprise, and thereby induce, cajole and force complainants and Arthur N. Powers to sell out their interests in the premises to Insull at a small percent, viz., five per cent of the actual value of the same; that on December 15, 1913, complainants and Arthur N. Powers, in reliance on Insull's promises, had practically exhausted their available funds other than the expected proceeds of a contemplated $2,500,000 issue of bonds by the Illinois Light and Power Company, and sundry purchase price payments upon various lands previously contracted for by Powers and Co. or the Illinois Light & Power Co. falling or past due, and that these and other pressing obligations of the co-partnership were pressing the Illinois Light and Power Co. into serious financial embarrassment; that Insull's promises and the formal agreement in accord with his contract of August 9, 1911, failing to materialize, Millard R. Powers, on December 15, 1913, appealed to Insull on behalf of the partnership and the Illinois Light & Power Co. to give the necessary directions and cooperation required to complete said agreement, and in default of the prompt completion thereof to loan the partnership or Illinois Light & Power Co. a sufficient sum to relieve the financial embarrassment and protect purchases of land and enable them to make such further purchases as they might find necessary; that Insull replied he could not command the funds necessary, but that if Millard R. Powers could show Insull the way to provide such funds, Insull would furnish $100,000 more or less, for such purpose; that thereupon on December 20, 1913, Millard R. Powers arranged with the Central Trust Company for a loan of $100,000 secured by the note of Millard R. Powers and Arthur N. Powers, payable either to the order of Insull or to the order of

and advertently influencing the minds of complainants and Arthur R. Powers successfully to procure said conversion, and thereby induce, coerce and force complainants and Arthur R. Powers to sell out their interests in the premises to Insull at a small percent, viz., five per cent of the actual value of the same; that on December 18, 1913, complainants and Arthur R. Powers, in reliance on Insull's promises, had practically exhausted their available funds other than the expected proceeds of a contemplated $2,000,000 issue of bonds by the Illinois Light and Power Company, and unless purchase price payments upon various lands previously contracted for by Powers and Co. or the Illinois Light & Power Co. failing or were due, and that these and other pressing obligations of the co-partnership were preceding the Illinois Light and Power Co. into serious financial embarrassment; that Insull's promises and the formal agreement in accord with his contract of August 8, 1913, failing to materialize, Arthur R. Powers, on December 15, 1913, appealed to Insull on behalf of the co-partnership and the Illinois Light & Power Co. to give the necessary directions and cooperation required to complete said agreement, and in default of the prompt completion thereof to loan the partnership or Illinois Light & Power Co. a sufficient sum to relieve the financial embarrassment and forest purchases of land and enable them to make such further purchases as they might find necessary; that Insull replied he could not convene the funds necessary, but that if Arthur R. Powers could show Insull the way to provide such funds, Insull would furnish $100,000 more or less, for such purpose; that thereupon on December 20, 1913, Arthur R. Powers arranged with the Central Trust Company for a loan of $100,000 secured by the note of Arthur R. Powers and Arthur R. Powers, payable either to the order of Insull or to the order of

themselves and by them endorsed and delivered to Insull with the entire $1,000,000 common stock of Illinois Light & Power Co. and $2,500,000 par value of bonds; that from time to time thereafter commencing December 30, 1913, and ending March 23, 1916, Insull advanced on the security of the last aforesaid capital stock and bonds, the sum of $137,526.29; before the last mentioned amount had been disbursed and about the middle of 1914, Insull advised Millard R. Powers to limit payment or investment in lands on account of general financial conditions, but he then and there approved a proposal to go ahead with certain borings for determining foundation conditions at the proposed site of the hydro electric plant, and commencing August 1914 and ending May 1915 the foregoing was done by Wilbur F. Powers, and the report of Sanderson & Porter submitted to Insull about May 25, 1915, but that Insull never got to the point of finally approving a definite and fixed rate per kilowatt hour to be paid by him under said alleged agreement of August 9, 1911; that the foregoing report of Sanderson & Porter was presented to Insull May 25, 1915; on June 15, thereafter, Insull pursuant to the alleged conspiracy, represented to Millard R. Powers and Arthur N. Powers that he desired and insisted upon a further report of other engineers, and that Insull under date last mentioned employed the engineering firm of Meade & Seastone, of Madison, Wisconsin, to check up Sanderson & Porter's purported reports and data, which they proceeded separately to do, and in September 1915 they presented an unfavorable report as to the output of the proposed plant "and consequent ability or inability to there produce Hydro electric energy at substantially less than the cost of coal produced electric energy, basing their conclusions upon a disagreement with the data of Sanderson & Porter as to the actual flow of water in the Kankakee River at the proposed site" of the hydro electric

themselves and by them endorsed and delivered to Insull with the entire $1,000,000 common stock of Illinois Light & Power Co. and $2,500,000 par value of bonds; that from time to time thereafter commencing December 30, 1912, and ending March 23, 1916, Insull advanced on the security of the last aforesaid capital stock and bonds, the sum of $127,588.98; before the last mentioned amount had been disbursed and about the middle of 1914, Insull advised Willard H. Bowers to limit payment or investment in lands on account of general financial conditions, but he then and there approved a proposal to go ahead with certain surveys for determining tonnage condition at the proposed site of the hydro electric plant, and on December August 1914 and ending May 1915 the foregoing was done by "Illor", Bowers, and the report of Sanderson & Porter submitted to Insull about May 25, 1915; but that Insull never got to the point of finally approving a definite and fixed rate per kilowatt hour to be paid by him under said alleged "agreement" of "Bower" 8, 1911; that the foregoing report of Sanderson & Porter was presented to Insull May 28, 1915; on June 15, thereafter, Insull presented to the directors, conferring represented to Willard H. Bowers and Illor H. Bowers that he desired and insisted upon a further report of other engineers, and that Insull under the last mentioned employed the engineering firm of Kuhn & Jacobs, of Madison, Wisconsin, to check up Sanderson & Porter's purported reports and data, which they proceeded apparently to do, and in September 1915 they presented an unfavorable report as to the output of the proposed land conservation ability or inability to there produce hydro electric energy at substantially less than the cost of coal produced electric energy, basing their conclusions upon a disagreement with the data of Sanderson & Porter as to the normal flow of water in the Kankakee River at the proposed site of the hydro electric

plant. On receiving the report of Meade & Seastone, Insull advised Millard R. Powers and Arthur N. Powers, and the Illinois Light and Power Company that in view of said report he did not see how he could go on with the plan to construct and operate the proposed hydro electric plant on the Kankakee River; about November 1915, ~~Millard R.~~ Wilbur F. Powers rechecked the Meade & Seastone report and found that they were in error in questioning the data of Sanderson & Porter, and that the report "was based upon mistake, oversight, carelessness or misintention"; that on October 16, 1915, Insull conceded that the report of Meade & Seastone was erroneous. From October 16, 1915 until December 15, 1916 Illinois Light and Power Company and the Powers partnership continued to prosecute some details of construction of the hydro electric plant, and Insull advanced the sum of $8,000, which was a part of the $137,526.29 last mentioned; that while Insull conferred with Sanderson & Porter and others from time to time, no apparent progress was made in getting Insull to the point of definitely fixing and determining the price to be paid for hydro electric power to be generated at the aforesaid plant, or to execute a formal agreement covering the alleged contract of August 9, 1911; that on December 16, 1916, Millard R. Powers, on behalf of the copartnership and the Illinois Light & Power Co., demanded of Insull that the formal written agreement be promptly executed, and then and there proposed to Insull that in default of so doing Millard R. Powers would refund to Insull the money secured by the capital stock and bonds of Illinois Light & Power Co., and seek elsewhere a customer other than those being supplied by Insull or the Public Service Company for such output of the aforesaid plant; that thereupon Insull, pursuant to said alleged conspiracy, declared to Millard R. Powers that he would regard any tender of payment of the aforesaid sum an

plant. On receiving the report of Keese & Seastone, Insull advised Millard K. Powers and Arthur K. Powers, and the Illinois Light and Power Company that in view of said report he did not see how he could go on with the plan to construct and operate the proposed hydro electric plant on the Kankakee River; about November 1918, ~~Millard K.~~ Powers rechecked the Keese & Seastone report and found that they were in error in questioning the data of Sanderson & Porter, and that the report "was based upon mistake, oversight, carelessness or misinformation"; that on October 16, 1918, Insull conceded that the report of Keese & Seastone was erroneous. From October 16, 1918 until December 18, 1918 Illinois Light and Power Company and the Powers partnership continued to prosecute some details of construction of the hydro electric plant, and Insull advanced the sum of $8,000, which was a part of the $137,358.38 last mentioned; that while Insull conferred with Sanderson & Porter and others from time to time, no apparent progress was made in getting Insull to the point of definitely fixing and determining the price to be paid for hydro electric power to be generated at the proposed plant, or to execute a formal agreement covering the alleged contract of August 6, 1917; that on December 16, 1918, Millard K. Powers, on behalf of the partnership and the Illinois Light & Power Co., demanded of Insull that the formal written agreement be promptly executed, and then and there proposed to Insull that in default of so doing Millard K. Powers could refund to Insull the money advanced by the capital stock and bonds of Illinois Light & Power Co., and seek elsewhere a purchaser other than those being supplied by Insull or the Public Service Commy for such output of the proposed plant; that thereupon Insull, without to said alleged conspiracy, declared to Millard K. Powers that he would refund any tender of payment of the proposed sum on

act of hostility and in the event of such tender would immediately proceed to purchase all lands in or about the site of said proposed plant and thus, and otherwise as he might, prevent the erection of such plant; that on December 17, 1916, Millard R. Powers again urged Insull that in default of the promised formal written agreement in accordance with the terms of the alleged agreement of August 9, 1911, Insull accept the repayment of the sum last mentioned, and thereupon Insull pursuant to said alleged conspiracy stated that he would not permit the payment of said last mentioned sum unless said co-partnership would first contract with Insull and the Public Service Co. on such terms and at such rates for electric energy as Insull might dictate, in which event he would accept in full payment of said $137,526.29 an issue of $150,000 par value 6% junior mortgage bonds of the Illinois Light & Power Co., the same being subject to an existing issue of $350,000 par value five year 6% first mortgage bonds of said Illinois Light & Power Co.; that on January 15, 1917, Millard R. Powers continued to insist that either Insull promptly perform his agreement of August 9, 1911, or permit the repayment to Insull of the last mentioned sum, "step out of the picture" and leave said co-partnership and Illinois Light & Power Company free to pursue construction and operation as best they might; that on January 27, 1917, Insull, pursuant to said alleged conspiracy, wrote Millard R. and Arthur M. Powers;

> " * * If, as has been suggested, you can get some good substantial people like Messrs. Sanderson & Porter to take hold of the project and push it I certainly have no objections. Moreover I am willing to aid the development of the project by them; or by other equally reliable and friendly persons by causing junior securities to be taken upon some terms mutually acceptable for the loans heretofore made to you, provided I can reserve, in some satisfactory way, an option to acquire the property upon some reasonable basis if I should hereafter desire to acquire it."

not of possibility and in the event of such tender would immediately proceed to purchase all lands in or about the site of said proposed plant and thus, and otherwise as he might, prevent the erection of such plant; that on December 17, 1942, William G. Powers again urged Insull not to default of the contract formal written agreement in accordance with the terms of the alleged agreement of August 6, 1941, Insull doubt the veracity of the non last mentioned, and thereupon Insull announced to said alleged conspiracy stated that he would not permit the payment of said last mentioned sum unless said co-conspirator would first contract with Insull and the Public Service Co. on such terms and at such rates for electric energy as Insull might dictate, in which event he would accept in full payment of said $127,000.00 on behalf of $125,000.00 to be [illegible] [illegible] bonds of the Illinois [illegible] Co. [illegible] subject to an existing issue of $500,000.00 by which five year [illegible] mortgage bonds of said Illinois Light & Power Co.; that on January 18, 1943, William G. Powers continued to insist to Insull Insull properly perform his agreement of August 6, 1941, or permit the repayment to Insull of the last mentioned sum, being out of the pocket" and leave said co-conspirator and Illinois Light & Power Company free to pursue construction and operation as best they might; that on January 27, 1943, Insull, [illegible] to said alleged conspiracy, wrote William G. Powers, [illegible]:

" " " 18, as has been suggested, you can [illegible] some good substantial people like Swanson [illegible] a "price to take hold of" the project and [illegible] it certainly bars no objections. Moreover I am [illegible] to aid the development of the project by [illegible] or other community railroads and friendly persons by [illegible] junior securities to be taken up [illegible] mutually acceptable for the large Hydroelectric [illegible] you, provided I can receive, in some satisfactory way, an option to acquire the property upon [illegible] reasonable basis if I should hereafter desire to acquire it."

Between February 1, and April 1, 1917, Illinois Light & Power Company, Millard R. Powers and Arthur N. Powers entered into negotiations looking to immediately raising sufficient moneys for said hydro electric plant, including the purchase of additional lands in its neighborhood, and to the sale of power or the bulk of the power to the Illinois Central Railroad Company for their use in operating suburban trains electrically; that in the course of said negotiations, arrangements were effected whereby a sum of $250,000 was deposited with the Chicago Title & Trust Company to the account of Arthur N. Powers for the use of the Illinois Light & Power Company for the purchase of additional lands in the neighborhood of the hydro electric plant; thereafter on April 2, 1917, Insull learned of the deposit of said $250,000 and thereupon, pursuant to such conspiracy, notified and directed said Illinois Light & Power Co., Millard R. and Arthur N. Powers to proceed no further with the financing independent of himself of the proposed hydro electric plant, and that Insull would proceed in accordance with the alleged contract of August 9, 1911, and in accordance therewith would have prepared a draft of electric service agreement providing the Public Service Company or other company controlled by Insull would purchase all of the electric energy generated at said plant at a price satisfactory to complainants and Arthur N. Powers; that said Illinois Light & Power Co., complainants and Arthur N. Powers, pursuant to the last direction of Insull and in reliance upon his promises, abandoned all plans and activities for the financing of said proposed plant independent of Insull, and accepted Insull's renewal of Insull's agreement of August 9, 1911; that thereafter until about December 2020, Insull delayed the execution of the aforesaid agreement under many pretexts, and while complainants, Arthur

between February 1, and April 1, 1917, Illinois Light & Power Company, Milward W. Power and Arthur R. Powers entered into negotiations looking to eventually raising sufficient money for said hydro electric plant, including the purchase of additional lands in its neighborhood, and to the sale of power or the bulk of the power to the Illinois Central Railroad Company for their use in operating locomotive engine electrically; that in the course of said negotiations, arrangements were effected whereby a sum of $50,000 was deposited with the Chicago Title & Trust Company to the account of Arthur R. Powers for the use of the Illinois Light & Power Company for the purchase of additional lands in the neighborhood of the hydro electric plant; thereafter on April 2, 1917, Insull learned of the deficit of over $100,000 and thereupon, pursuant to such conspiracy, notified and directed Illinois Light & Power Co., Milward W. and Arthur R. Powers to proceed no further with the financing independent of assistance of the proposed hydro electric plant, and that Insull would proceed in accordance with the signed contract of August 3, 1917, and in accordance therewith would have presented a draft of electric service agreement providing the Illinois Power Company or other company controlled by Insull could purchase all of the electric energy generated at said plant at a price satisfactory to complainants and Arthur R. Powers; that said Illinois Light & Power Co., complainants and Arthur R. Powers, pursuant to the last direction of Insull and in reliance upon his promises, abandoned oil plans and activities for the financing of said proposed plant independent of Insull, and accepted Insull's promises of Insull's agreement of August 3, 1917, that thereafter until about December 1920, Insull delayed the execution of the aforesaid agreement under many pretexts, and while complainants, Arthur

N. Powers and Illinois Light & Power Co. were so kept waiting upon Insull, Illinois Light & Power Co., complainants and Arthur N. Powers fell into default as to the arrangement under which the $250,000 had been deposited with said "First National Bank", and on June 1, 1917 the depositors thereof withdrew that sum; that among other means and causes of delay during the period last aforesaid, was a demand by Insull, pursuant to said conspiracy, of an inventory by Sanderson & Porter of all the property, real or personal acquired by Arthur N. Powers and Co. and said Illinois Light & Power Co. for and in connection with the construction of said proposed hydro electric plant; that the preparation of such inventory required many weeks of time and was finally completed September 1, 1917, and showed a then cash value of real and personal property of $438,004.75; that in reliance on the aforesaid alleged promises complainants and Arthur N. Powers had dropped all negotiations in the matter with Illinois Central Railroad and as the result thereof and their aforesaid default touching the deposit of said $250,000, were then and indefinitely thereafter, for five years, in no position and unable to any practical purpose to resume negotiations with said railroad of all of which facts and circumstances Insull was fully advised, and on January 2, 1917, Insull in pursuance of said conspiracy, offered to purchase of complainants and Arthur N. Powers the entire assets of the co-partnership and the Illinois Light & Power Co. of the value of $438,004.75, for $80,000, which offer was refused. Thereupon Insull again resumed "the stalling process" and caused to be prepared agreements from time to time, none of which specified the price to be paid for the electric energy generated at the aforesaid plant; that at least one of the last mentioned drafts gave to Insull the right to purchase the plant at the end of five years on the basis of net earnings of the plant for that period, and then

R. Lowers and Illinois Light & Power Co. were to lease [illegible] upon Insull, Illinois Light & Power Co., consolidated and Arthur R. Powers fell into default as to the arrangement under which the $250,000 had been deposited with said "First National Bank", and on June 1, 1917 the impositors thereof attorney that sum; that among other sums and causes of doing during the period last aforesaid, was a demand by Insull, pursuant to said conspiracy, of an interest by Anderson & Porter of all the property, real or personal acquired by Arthur R. Powers and Co. and said Illinois Light & Power Co. for and in connection with the construction of said proposed hydro electric plant; that the preparation of such interest required many years of time and was finally completed sometime in 1917, and placed a then cash value of real and personal property of $250,000.00; that in reliance on the aforesaid claim, the same complainants and Arthur R. Powers had dropped all negotiations in the matter with Illinois Central Railroad and as the result thereof and their aforesaid default towards the Insull of said $250,000, were then and indefinitely thereafter, for five years, in no position and unable to pay executed offers to renew negotiations with said Railroad of all of which Insull and Anderson knew Insull was fully advised, and on January 4, 1917, Insull in ignorance of said conspiracy, offered to Anderson or complainants and Arthur R. Powers the entire assets of the [illegible] and the Illinois Light & Power Co. of the value of $[illegible], for $80,000, which offer was refused. Thereupon Insull [illegible] resumed "the selling process" and proceed to be required approximate from time to time, some of which modified the [illegible] to be paid for the electric energy, [illegible] of the [illegible] that at least one of the last mentioned lines was to insure the right to purchase the plant at the end of five years on the

included arbitrary and unreasonable provisions calculated to unjustifiably cut down the earnings of the plant; that in August 1917 the United States entered the World War, following which and until Armistice Day, Insull recurringly used the fact of the war as a reason for his taking further time in arriving at definite arrangements in the premises, insisting that it was highly undesirable to proceed with the enterprise until the termination of the war; that about November 1918 Veva Powers, former wife of Arthur N. Powers, instituted suit in the Superior Court of Cook County, against her former husband, the Illinois Light & Power Co., Millard R. and Wilbur F. Powers, and Insull and others, to foreclose upon the interests of Arthur N. Powers in the common capital stock of Illinois Light & Power Co., theretofore on April 1, 1914, assigned by Arthur N. Powers to Millard R. Powers as trustee, to secure the payment to Veva Powers of $150 a month alimony for the life of said Veva Powers, or until she should remarry; that from November 15, 1918 until December 20, 1920, while Millard R. Powers had a number of conferences with Insull, Insull postponed further action on his part on the ground among others, of the pendency of the last mentioned suit.

That in the Powers' divorce suit the wife claimed a lien upon the stock of Illinois Light & Power Co. in virtue of a contract dated March 28, 1914 between her and her divorced husband and Millard R. Powers, which assigned to the latter in trust all interest of Arthur N. Powers in such capital stock to secure certain provisions by Arthur N. Powers for the support of Veva Powers. In that suit Veva Powers contended that as against her, Millard R. Powers was estopped to deny that Arthur N. Powers was the sole owner of such capital stock, and in said suit by consent of the parties the court so decreed; other contentions

included arbitrary and unreasonable provisions calculated to unjustifiably cut down the earnings of the client; that in August 1917 the United States entered the world war, following which and until Armistice Day, Insull resourcefully used the fact of the war as a reason for his taking further time in arriving at definite arrangements in the premises, insisting that it was highly undesirable to proceed with the enterprise until the termination of the war; that about November 1918 Vera Powers, former wife of Arthur R. Powers, instituted suit in the superior court of Cook County, against her former husband, the Illinois Light & Power Co., Willard R. and William S. Powers, and Insull and others, to foreclose upon the interests of Arthur R. Powers in the common capital stock of Illinois Light & Power Co., thereafter on April 1, 1919, assigned by Arthur R. Powers to William R. Powers as trustee, to secure the payment to Vera Powers of $150 a month alimony for the life of said Vera Powers, or until she should remarry; that from November 15, 1918 until December 30, 1920, while William R. Powers had a number of conferences with Insull, Insull postponed further action on his part on the ground among others, of the pendency of the last mention suit.

That in the Powers' divorce suit the wife obtained a lien upon the stock of Illinois Light & Power Co. in virtue of a contract dated March 25, 1914 between her and her divorced husband and William R. Powers, which remained to the latter in trust all interest of Arthur R. Powers in such capital stock to secure certain provisions by Arthur R. Powers for the support of Vera Powers. In that suit Vera Powers contended that as against her, William R. Powers was estopped to deny that Arthur R. Powers was the sole owner of such capital stock, and in said suit by consent of the parties the court so decreed; other contentions

between the parties were made and these were settled between them by a contract dated December 21, 1920, copy of which, marked Exhibit A, was made a part of the bill; that between November 1918 and December 1920 Insull assured Millard R. Powers that when the differences between Arthur N. Powers and his wife were terminated he would proceed to execute the service contract of August 9, 1911. On December 28, 1920, Millard R. and Wilbur F. Powers notified Insull that a settlement had been effected between complainants and Arthur N. Powers eliminating Arthur from the enterprise and requested an early appointment with Insull; that Insull, either directly or through his solicitor in the Powers divorce suit, was already advised of the negotiations, execution and contents of the contract of December 21, 1920, and on January 2, 1921, Insull, pursuant to the alleged conspiracy, represented to complainants that he was too busy with other matters to state what the rate of compensation for the hydro electric plant energy would be, but that he would direct Sargent & Lundy, engineers, to make the necessary examinations and send the report to him; that he would also direct Buell McKeever to prepare a draft of service contract and advise him as to the proper procedure for releasing Insull's lien on the stock and bonds of Illinois Light & Power Company; that on January 27, 1921 Millard R. Powers, relying on Insull's said promises, secured at an expenditure of $2000 the promise of the Chicago Title & Trust Company to act as trustee and title examiners in acquiring lands near the site of the hydro electric plant, and arranged with R. E. Wilsey & Co., bankers, for a sale of bonds of the Illinois Light & Power Co. ample for the requirements of such enterprise, subject only to the execution by Insull of a written service contract, and on January 28, 1921, so advised Insull; that Insull promised that as soon as he received a report from Monroe of Sargent & Lundy, the draft of an electric service agreement specifying the rate

between the parties were made and these were satisfied outright from by a contract dated December 31, 1920, copy of which, marked Exhibit A, was made a part of the bill; that between November 1918 and December 1920 Insull secured Allard H. Powers that when the differences between Arthur W. Powers and his wife were terminated he would proceed to execute the service contract of August 5, 1911. On December 23, 1920, Allard H. and Arthur W. Powers notified Insull that a settlement had been effected between complainants and Arthur W. Powers although refusal from the subpoena and requested an early appointment with Insull; that Insull, either directly or through his solicitor in the Powers divorce suit, was already advised of the negotiations, execution and contents of the contract of December 31, 1920, and on January 5, 1921, Insull, pursuant to the alleged conspiracy, represented to complainants that he was too busy with other matters to state what the rate of compensation for the hydro electric plant energy would be, but that he would direct Sargent & Lundy, engineers, to make the necessary examinations and send his report to him; that he would also direct Insull Kolmerer to prepare a draft of service contract and advise him as to the proper procedure for releasing Insull's lien on the stock and bonds of Illinois Light & Power Company; that on January 27, 1921 Allard H. Powers, relying on Insull's said promises, received an expense share of $2000 the premium of the Chicago Title & Trust Co. may to act as trustee and title examiner in acquiring lands near the site of the hydro electric plant, and arranged with H. C. Allsup & Co., bankers, for a sale of bonds of the Illinois Light & Power Co. ample for the requirements of such enterprise, conditioned only on the execution by Insull of a written service contract, and on January 28, 1921, so advised Insull; that Insull promised that as soon as he received a report from Sargent & Lundy, the draft of an electric service agreement embodying the rate

to be paid for electric energy sufficient to meet all financial requirements and yield a reasonable profit to Illinois Light & Power Company would be prepared and be available for reference as a basis for financing the purchase of necessary lands for said proposed plant through the co-operation of Chicago Title & Trust Company; that in the meantime and unknown to complainants until May 5, 1927, Insull was scheming and devising to play complainants against Arthur N. Powers and cause complainants to fall into default to Arthur N. Powers and other parties in interest in the premises, so that Insull might eliminate complainants from the enterprise and acquire their interests for little or no consideration. Complainants state on information and belief that with the aforesaid end in view Insull solicited and induced Arthur N. Powers to violate the last mentioned contract and enter into negotiations with Insull contrary to the provisions of the contract of December 21, 1920, requiring that he should refrain from interfering with or embarrassing complainants in their efforts to develop the hydro electric project on the Kankakee River, and Arthur N. Powers represented to Insull that if complainants could be put in default and the interests of complainants forfeited to him or otherwise disposed of, Insull could deal with Arthur N. Powers more favorably to Insull than he could deal with complainants, and on January 21, 1921, Insull and Arthur N. Powers conspired together to lead complainants to rely on Insull and his promises until they should be brought into pretended default to Insull or other lien holders, so that Insull might be enabled to terminate the interests of complainants in the premises and same might be forfeited to Arthur N. Powers, so that the latter might be able to secure from complainants, releases of complainants' interests in the premises, ~~as~~ that on May 4, 1921, in the suit of Veva Powers against Arthur N. Powers,

to be paid for electric energy [illegible] to date [illegible] regulations and yield a reasonable profit to Ithaca [illegible] A Power Company could be prepared and be available for [illegible] as a basis for financing the purchase or acquisition [illegible] said proposed plant through the conversion [illegible] a Trust Company; that in the meantime and [illegible] until May 8, 1927, Israel was scheming and devising to stay complainants against Arthur B. Jones and [illegible] to fall into default to Arthur B. Jones and other parties in interest in the premises, so that Israel might eliminate complainants from the enterprise and acquire their interests for little or no consideration. Complainants state on information and belief that with the aforesaid and in view Israel anticipated and induced Arthur B. Jones to violate the last mentioned contract and enter into negotiations with Israel contrary to the provisions of the contract of December 21, 1920, requiring that he should refr from interfering with or conferring complainants in their efforts to develop the hydro electric project on the Cayuga River, and Arthur B. Jones represented to Israel that if complainants could be put in default and the interests of complainants forfeited to his or otherwise alienated of, Israel would deal with Arthur B. Jones more favorably to Israel than he would deal with complainants, and on January 21, 1927, Israel and Arthur B. Jones conspired together to lead complainants to rely on Israel and his promises until they should be brought into premeditated default to Israel or other item holders, so that Israel might be enabled to trample in the int rests of complainants in the premises and thus might be forfeited to Arthur B. Jones, so that the latter might be able to secure from complainants, release of complainants' interests in the premises, and that on May 4, 1927, in the guilt of Jone Jones implied Arthur B. Jones,

Insull and others, a final decree was duly entered finding among other things that Millard R. Powers was estopped as against Veva Powers, from claiming any interest in the stock of the Illinois Light & Power Company. By the agreement and consent of all the parties recited in the decree, it was among other things decreed that Arthur N. Powers and Millard R. Powers, and Illinois Light & Power Company were jointly indebted to Insull on account of the $137,526.29 and interest in the total sum of $193,544.95, secured by the entire capital stock of Illinois Light & Power Co. and the bond issue of $2,500,000; that Insull might sell said stocks and bonds on ten days notice to the interested parties, and that Insull might release Arthur N. Powers, Millard R. Powers and Illinois Light & Power Co. from the indebtedness to Insull, or extend payment from time to time without releasing the obligation of any of the parties not so released or the collateral. In said decree it was recited, on the facts shown by the evidence and the agreement and consent of all the parties except O. M. Powers, that Veva Powers had a lien on the 10,000 shares of Illinois Light & Power Co. for $30,000 with interest from the date of the decree, subject to the lien of Insull, also the lien of Central Trust Company for $5000; that the defendants other than Insull and the trust company pay Veva Powers within ten days from the entry of the decree $30,000; that in default of so doing 10,000 shares of the stock would be sold at public sale, subject only to the liens of Insull and the Central Trust Company; that in the event of the sale of said stock under said decree, any sum in excess of the amount due Veva Powers be paid to Insull and the Central Trust Company, to be applied on their liens, and that any further amount realized from such sale should be brought into court subject to its further order.

Insull and others, a final order was duly entered finding, among other things that William R. Powers was estopped as against Vera Powers, from claiming any interest in the stock of the Illinois Light & Power Company. By the agreement and consent of all the parties recited in the decree, it was among other things decreed that William R. Powers and William, Powers, and Illinois Light & Power Company were jointly indebted to Insull on account of the $127,870.39 and interest in the total sum of $185,844.08, secured by the pledge original stock of Illinois Light & Power Co. and the loan issue of $[illegible]; that Insull might sell such stocks and bonds as has been notice to the interested parties, and that Insull might release William R. Powers, William R. Powers and Illinois Light & Power Co. from the indebtedness to Insull, or extend payment from time to time without releasing the obligation of any of the parties not so released or the collateral. In this decree is the recitation, on the facts shown by the evidence and the agreement and consent of all the parties except [illegible] Powers, that Vera Powers had a lien on the 10,000 shares of Illinois Light & Power Co. for $70,000 with interest from the date of the decree, subject to the lien of Insull, also the lien of Central Trust Company for $8000; that the defendants other than Insull and the trust company pay Vera Powers within ten days from the entry of the decree $30,000; that in default of so doing 10,000 shares of the stock would be sold at public sale, subject only to the lien of Insull and the Central Trust Company. That in the event of the sale of said stock under said decree, any sum in excess of the amount due Vera Powers be paid to Insull and the Central Trust Company, to be applied on their liens, and that any surplus arising from such sale should be brought into court subject to its further order.

That between December 2, 1920 and December 15, 1923, Sanderson, on the request of Insull and as part of the alleged conspiracy, attempted to buy out Wilbur F. Powers for $5,000 and Millard R. Powers for $15,000; that in October 1921, Insull caused it to be represented to Millard R. Powers that he required further information from complainants' engineers, Sanderson & Porter, for the use of Monroe, and that the last mentioned service contract had been drafted and approved (but not executed) except as to the price to be provided therein to be paid for electric energy, which would be settled as soon as Monroe reported; that during twelve months of the period last mentioned Insull was, or claimed to be, in ill health, and pursuant to said conspiracy, in prentended explanation of the delay, Insull caused to be represented to complainants that owing to his ill health and other demands upon his time, he was unable to give the necessary attention to the matter; that on February 7, 1923, he notified complainants that the matter of the development of the Kankakee River proposition was in the hands of Mr. Sanderson; that thereafter and until September 15, 1924, complainants pursued negotiations with Sanderson & Porter without effect; that by June 4, 1921, Veva Powers, through her counsel, advised Millard R. Powers that it had come to his knowledge, as attorney for Veva Powers, that Arthur N. Powers was planning to make some claim to the capital stock of Illinois Light & Power Co. as assignee of third parties, or otherwise, adverse to the terms of the decree of May 4, 1921; that to protect Veva Powers against said threatened claim, said attorney would cause the capital stock of Illinois Power & Light Co., last mentioned, to be sold at public auction under the decree, and that at such sale he would cause the said capital stock to be bid in by Veva Powers, and that notwithstanding such sale complainants should continue negotiations with Insull under the contract of December 21, 1920,

that between [illegible] Insull and Insull, 1914, [illegible] transferred, on the payment of Insull and [illegible] the Illinois corporation, attempted to buy out Milner's power for [illegible] Milner's power for $18,000; that in October 1921, Insull caused it to be represented to Insull [illegible] power that be required further information from confidential employees [illegible] motor, for the use of [illegible], and that the last [illegible] service contract had been [illegible] and approved [illegible] except as to the price to be [illegible] electric energy, which could be settled in [illegible]; that during twelve months of the critical [illegible] was, or claimed to be, in its [illegible] [illegible] epitaph, in presumed explanation of the delay, Insull [illegible] to be represented to companies that owing to ill health and other demands upon his time, he was unable to give the necessary attention to the matter; that on February 7, 1922, [illegible] notified complainants that the action of the legislature of the Kankakee River Proposition was in the hands of [illegible]; that thereafter and until September 15, 1924, complainants pursued negotiations with Insull [illegible] without success; that by June 4, 1923, Vera Power, through her counsel, advised Milner & Power that it had been to the knowledge of its attorney for [illegible] years, that either Milner & Power was pledged to [illegible] some claim to the capital stock of Illinois [illegible] or [illegible] as designee of [illegible] or otherwise, [illegible] to the terms of the decree of May 4, 1921; that to protect [illegible] against [illegible] claim, said attorney could [illegible] capital stock of Illinois Power & Light Co., [illegible], to be sold at public auction under the decree, and that [illegible] he would cause the said capital stock to be sold [illegible], and that notwithstanding such communications [illegible] negotiations with Insull under the control of [illegible], 1924,

and that Veva Powers would be and would remain ready and at all times glad to co-operate with complainants; that thereafter on July 15, 1921, Veva Powers, pursuant to the decree of May 4, 1921, caused 10,000 shares of the stock of Illinois Light & Power Company to be sold at public auction and herself bid the sum of $25,000 therefor, subject to the Insull and Central Trust Company prior liens; and thereupon the Master conducting the sale issued to Veva Powers a certificate of sale, and thereafter pursuant to said master's report a defidiency decree was entered in favor of Veva Powers for some $5295.83; that on June 15, 1922, Insull, pursuant to the said conspiracy, secretly induced and directed Sanderson to procure from Veva Powers (nominally in the name of Sanderson and pretendedly for and on his behalf, but in fact for the benefit of Insull) an option of date June 15,1922, upon the master's certificate and the title of said Veva Powers thereunder to the stock aforesaid, said agreement being made a part of the bill as Exhibit B; that contemporaneously therewith Insull in pretended performance by Sanderson to that extent of the option of June 15, 1922, executed and delivered to Sanderson and caused him in turn to attach said option contract and deliver to Veva Powers contemporaneously with the delivery to Veva Powers of the last mentioned contract, a certain memorandum of Insull dated June 15, 1922, appearing in Exhibit B. Following the signatures of the parties to said last mentioned contract, which memorandum or agreement is by reference made a part of the bill; that pursuant to said option Insull became the potential owner of all liens upon said last mentioned capital stock, the holder or holders of which had the sole right under the contract of December 21, 1920, to terminate for lapse of time the exclusive rights of complainants, under said last mentioned contract, to prosecute said proposed hydro electric plant on the Kankakee River.

and that Vera Power would be and would remain [illegible] and at all times glad to co-operate with complainants; that thereafter on July 15, 1921, Vera Power, pursuant to the [illegible] of May 1, 1921, caused 10,000 shares of the stock of Illinois [illegible] Company to be sold at public auction and thereby did the sum of $25,000 thereto, subject to the liens and [illegible] prior liens; and thereupon the water [illegible] to Vera Power a certificate of sale, and thereafter pursuant to said master's report a satisfactory deed was entered in favor of Vera Power for said [illegible]; that on June 16, 1922, pursuant to the said judgment, certain indemnity and attorney bondsman to procure from Vera Power (nominally in the name of Bundrson and respondents for him on his behalf, but in fact for the benefit of Insull) an option of sale dated June 16,1922, upon the master's certificate and the stock of said Vera Power thereunder to the stock aforesaid, said agreement being made a part of the bill as Exhibit A; that contemporaneously therewith Insull in pretended performance by Bundrson to that extent of the option of June 16, 1922, assented and believed to Bundrson and caused him in turn to attack said option contract and [illegible] to Vera Power contemporaneously with the delivery to [illegible] of the last mentioned document, [illegible] dated June 16, 1922, by which [illegible] Vera Power [illegible] signatures of the parties to said last mentioned document, which assertions or agreement is by reference made a part of the bill; that pursuant to said option Insull drove the personal [illegible] of all liens upon said last mentioned capital stock, the holder or holders of which had the sole right under the [illegible] of December 21, 1920, to terminate for lapse of time [illegible] rights of complainants, under said last mentioned [illegible] to procure said proposed public sale; that on the [illegible] Vera

That the $5,000 indebtedness to the Central Trust Company was evidenced by a note of William A. Fox, Treasurer of the Public Service Company, and under the dominion of Insull; that on December 15, 1923, Sanderson, under the direction and in accord with the conspiracy of Insull, notified complainants that Insull then and there controlled the market for electric energy within the market radius of the last mentioned proposed hydro electric plant, and had it within his power to ignore the rights of complainants in the premises, but as a matter of good will was disposed to and would pay Wilbur F. Powers $5,000 and Millard R. Powers $15,000 for their interests in the enterprise and release Millard R. Powers from all obligation to him, which offer complainants declined to accept.

During the pendency of the aforesaid negotiations Insull through Buell McKeever had reported to complainants that he would not name or agree to a price to be paid by Insull or the Public Service Company for electric energy, unless prior to or contemporaneously with the same, complainants effected the necessary final arrangements to completely construct and put the aforesaid plant in operation, because, as McKeever then and there represented Insull as stating, Insull was unwilling to have any such price communicated to different banks and bond houses, lest the rate become public property and be utilized against Insull or his interests before the Public Utilities Commission of this state; that notwithstanding complainants' protest that the naming and offering of such price was actually what Insull had theretofore promised and undertaken to do, McKeever insisted that such was and would continue to be the position of Insull; thereupon on October 15, 1923, and until October 15, 1924, complainants planned and occupied themselves working out and securing definite and comprehensive agreements

with [illegible] Bilay

that the 6,000 indebtedness to the Central Fuel Company was evidenced by a note of Hilliard, Orr, President of the Mobile Service Company, and under the location of Insull; that on December 15, 1927, Hunderson, Orr the director and in accord with the conspiracy of Insull, filed complaints that Insull then and there controlled the market for electric energy within the market radius of the Arkansas Hydro-Electric plant, and had it within his power to ignore the rights of complainants in the premises, and as a matter of fact did so dispose to and would pay Hilliard 6,000 and Hilliard Orr, Jones, 15,000 for their interests in the enterprise and release Hilliard, Jones from all obligation to them, which offer complainants declined to accept.

During the pendency of the aforesaid negotiations Insull through Insull Advisers had requested to complainants that he would not name or agree to a price to be paid by Insull or the Mobile Service Company for electric energy, unless prior to or contemporaneously with the same, complainants effected the necessary final arrangements to completely consummate and put the aforesaid plant in operation, however, as moreover then and there represented Insull is obtaining, Insull was qualifying to have any such price communicated to different banks and bond houses, lest the rate become public property and be utilized against Insull or its interests before the Mobile Utilities Commission of this state; that notwithstanding complainants' protest that the making and offering of such price was improper that Insull had therefore promised and understood to do, however insisted that such was as was would continue to be the position of Insull; thereupon on October 15, 1927, and until October 15, 1928, complainants planned and computed thoroughly working out and securing definite and comprehensive statements

with R. M. Wilsey & Co., bankers, and responsible contractors, J. O. Heyworth, of Chicago, which included the terms of the undertaking under such plan by Insull and Public Service Company, and thus to meet said pretended objection of Insull to naming a price for electric energy in advance of the financing of the enterprise by complainants; that on October 15, 1924, complainants attempted to present said completed plan to one Waldo F. Tobey, one of the attorneys, etc. of Insull, who told them that Insull was about to enter into a contract in the matter with Arthur N. Powers and would not consider complainants proposals; that between the last two mentioned dates complainants had advised Insull in a general way of their plan as hereinbefore set out; that on January 2, 1924 Insull caused complainants to be notified that he was negotiating for electric service with Arthur N. Powers; that thereafter on February 1, 1924, complainants learned, and the fact was, that said last mentioned proposed agreement under negotiation between Insull and Arthur N. Powers contemplated allowing the latter a period of six months within which to completely finance said enterprise, and provided that if he was successful in so doing within said time that Insull was to have a one-half interest in said enterprise, but that if Arthur N. Powers was not successful, all his interest should be terminated and become the property of Insull, and that in the negotiations between Insull and Arthur N. Powers, Insull represented to Powers that if said agreement was entered into Insull would furnish Arthur N. Powers with sufficient money to satisfy and discharge any agreement Powers might make with complainants in order to procure from complainants releases of their interests in the premises; that the last mentioned draft of service contract included the specific rate per kilowatt hour to be paid by Public Service Company but contained provisions such as

with R. S. Riley & Co., bankers, and responsible partners, C. G. Heyworth, of Ohio, C., which included the least of the undertaking under such terms by Ignell and Ushik. Every measure, and thus to meet all intended objects in of Ignell to [illegible] price for electric energy in excess of [illegible] of the equipment of some amount that is [illegible], and, consequently allowed to prevent said [illegible] to one year [illegible] Ebby, one of the attorneys, also, of [illegible] [illegible] that Ignell was about to enter into a new [illegible] [illegible] Lowers and could not consider [illegible] between the last two versions of the [illegible] Ignell is a [illegible] that on January [illegible] that he was negotiating for Ebby's service with [illegible] that [illegible] in January). [illegible] the fact was, that [illegible] negotiation between Ignell and either R. [illegible] allowing the latter [illegible] of six months [illegible] completely finance and [illegible] successful in so doing within [illegible] a one-half interest in said enterprise, [illegible] Lowers was not successful, [illegible] and based the property of [illegible] between Ignell and either R. [illegible] Lowers that if such agreement [illegible] into Ignell would [illegible] R. Lowers will [illegible] change any agreement Lowers [illegible] in order to secure from [illegible] of their [illegible] in the premises; that the last [illegible] contract included the assets [illegible] by public service [illegible] contracted [illegible]

patently to render said last mentioned service agreement impractical and made it obviously impossible to finance the enterprise; that on February 2, 1924, complainants so advised Arthur N. Powers; on July 26, 1924, Insull, through Tobey, informed complainants that the opportunity Insull was then giving Arthur N. Powers to carry out said enterprise was the only one Insull would give anybody, to which complainants replied that they were entitled to priority of opportunity over Arthur N. Powers, and they were insisting and would insist upon their rights in the premises; following the declaration of October 15, 1924, that Insull would not negotiate with complainants and that they would have to deal in the premises through or with Arthur N. Powers, complainants on October 16, 1924, came to an oral understanding with Arthur N. Powers temporarily to suspend all questions of the relative rights of complainants and Arthur N. Powers to negotiate or close a deal with Insull and to proceed, through Arthur N. Powers, to endeavor to bring Insull to the point of going through with the proposed leasing plan worked out by complainants, or some other fair and reasonable arrangement in the matter; that pursuant to said oral understanding complainants on the last mentioned date furnished Arthur N. Powers with further data and figures showing the impracticability of said draft of service agreement, and also figures and tabulations supporting the last mentioned leasing plan, and copies of complainants' proposed contracts with Wilsey & Company and J. O. Heyworth; that thereafter negotiations between Arthur N. Powers and Insull were continued without effecting anything material. Meanwhile and while the aforesaid negotiations were pending, complainants and defendant Arthur N. Powers, drafted under date of February 21, 1925, a memorandum of agreement, the parties to which were Arthur N. Powers of the first part and complainants of the second part, which proposed contract provided <u>inter alia</u>

potently to tender said last mentioned service agreement impractical and made it obviously impossible to finance the undertaking; that on February 5, 1924, complainants so advised Arthur R. Jones; on July 30, 1924, Insull, through Cooley, informed complainants that the opportunity input was then giving Arthur R. Jones to carry out said activities - the only one Insull would give anybody, to which complainants replied that they were entitled to priority of opportunity over Arthur R. Jones, and they were insisting and would insist upon their rights in the premises; following the declaration of October 15, 1924, that Insull would not negotiate with complainants and that they should have to deal in the premises through or with Arthur R. Jones, complainants on October 16, 1924, came to an oral understanding with Arthur R. Jones temporarily to suspend all questions of the respective rights of complainants and Arthur R. Jones to negotiate or close a deal with Insull and to proceed, through Arthur R. Jones, to endeavor to bring Insull to the point of doing business with the proposed association formed out by complainants, or some other just and reasonable arrangement in the matter; that pursuant to said oral understanding complainants on the last mentioned date informed Arthur R. Jones with further date and figures showing the approximately [illegible] of service agreement, and also figures and [illegible] supporting the last mentioned loading gain, and copies of complainants' proposed contracts with Illinois Company [illegible] beyond; that thereafter negotiations between Arthur R. Jones and Insull were continued without effecting anything a[illegible] meanwhile and while the aforesaid negotiations were pending, complainants and defendant Arthur R. Jones, acting under date of February 21, 1925, a memorandum of agreement, the entire [illegible] which were Arthur R. Jones of the first part, and [illegible] of the second part, which proposed contract provides inter alia

for releases
by complainants of their interests in the Illinois Light & Power Co., and also provided that contemporaneously with the execution of the contract and contemplated releases Arthur N. Powers should make cash payment to complainants of $5000, which it was understood between the parties would be furnished by Insull pursuant to promises or representations that Insull would furnish Arthur N. Powers with the necessary funds to procure such releases from complainants; that said draft of contract was signed by the parties thereto and the releases therein provided for were also signed by complainants; that neither were delivered because complainants were informed by Arthur N. Powers on February 22, 1925, that he applied to Tobey for $5000 to pay complainants for the aforementioned releases and Tobey stated that no moneys would be furnished by Insull to procure releases from complainants because Arthur N. Powers refused to accept or execute the aforesaid draft of service agreement; that from said last mentioned date to the latter part of July 1925, negotiations continued between Arthur N. Powers and Sanderson, who represented Insull; the latter was endeavoring to persuade Insull to necessary modification of the draft of service contract, or to consider a leasing plan; Sanderson at one time refused to modify and defended the terms of said service agreement, and at another time urged Arthur N. Powers to sell out for a nominal sum of $25,000, and at all times objected to consider a leasing plan and opposing any active progress of negotiations "on one untenable ground and another"; that finally Millard R. Powers, the latter part of July,1925, and defendant Arthur N. Powers met with Insull and at that meeting Insull stated that he would not object to a leasing plan and would go through with any plan that would make the enterprise a success, although it might cost Insull's companies more than steam generated energy, and told Millard R. and Arthur N. Powers to prepare such plans as

for releases

by complainants of their interests in the Illinois Light & Power Co., and also provided that contemporaneously with the execution of the contract and consummation release, Powers should make cash payment to complainants of $[illegible], which it was agreed between the parties would be furnished by Insull company to Powers with the necessary funds to procure such releases from complainants; that said draft of contract was signed by the parties thereto and the release therein provided for were also signed by complainants; that neither were delivered because complainants were informed by Insull & Powers on February 22, 1932, that he applied to Judge [illegible] to pay complainants for the aforementioned releases and Judge stated that no money would be furnished by Insull to procure releases from complainants because Arthur K. Powers refused to execute the aforesaid draft of service agreement; that from this last sentence date to the latter part of July 1932, negotiations continued between Arthur K. Powers and Arthur, the represented Insull; the latter was endeavoring to persuade Insull to necessary modification of the draft of service contract, or to consider a leasing plan; whereupon at one time refused to modify and delended the terms of said service agreement, and at another time urged Arthur K. Powers to sell out for a nominal sum of $25,000, and at all times endeavored to consider a leasing plan and opposing any active promotion of negotiations for one mutually round and satisfactory; that finally relied K. Powers, the latter part of July,1932, and returning Arthur K. Powers met with Insull and at that meeting Insull stated that he could not object to a leasing plan and could go through with any plan that would make the enterprise a success. Although it might cost Insull's companies more than stock, money and energy, and told Allison K. and Arthur K. Powers to attempt such leasing

would be satisfactory and would safely finance such enterprise.

Complainants state that during 1925 they were informed that Insull was in Europe, Tobey was out of the city and Sanderson was otherwise occupied, and in the meantime Millard R. and Arthur N. Powers were proceeding with an effective leasing and the preparation of the "necessary incidental written agreements"; that on November 18, 1925, the two last mentioned Powers, at the request of Sanderson, met him at Chicago, and in reply to an inquiry by Sanderson for their proposition in the premises, delivered to Sanderson the draft of the leasing agreement providing for the operation of the proposed hydro electric power plant by the Public Service Company for a period of fifty years upon a monthly compensation basis to Illinois Light & Power Company, and that Insull should have one-half of the common capital stock of said last mentioned company provided he took up and cancelled the master's certificate of sale of the capital stock of the Illinois Light & Power Company, and furnished a sum sufficient to discharge all other liens and claims against the hydro electric power enterprise; and Millard R. Powers informed Insull that said last mentioned contemplated agreement had been submitted to Blyth, Wither & Company, bankers, and that they had virtually contracted to purchase at 90% of their par value $4,000,000 par value first mortgage five per cent bonds, to be issued by Illinois Light & Power Company, and $1,500,000 par value 7% preferred stock of the same company, without any guaranty as to principal or interest by either Insull or any company, other than Illinois Light & Power Company; that said proposed agreement was along the same lines as the so-called electric service agreement "Exhibit C", between the Powers Company and the Public Service Company of July 1926, only a little more favorable to the Public

would be satisfactory and would safely finance such expansion.

Complainants state that during 1925 they were informed that Insull was in Europe, Insull was out of the city, Mr Sanderson was otherwise occupied, and in the meantime allied R. and Arthur R. Jones were proceeding with an effective issuing and the preparation of the "necessary incidental written agreements"; that on November 19, 1925, the two last mentioned Jones, at the request of Sanderson, met him at Chicago, and in reply to an inquiry by Sanderson for their proposition in the premises, delivered to Sanderson the draft of the issuing agreement providing for the creation of the proposed Ryan electric power plant by the Public Service Company for a period of fifty years upon a monthly compensation paid to Illinois Light & Power Company, and that Insull should have one-half of the common capital stock of this last mentioned company provided he took up and accepted the writer's certificate of sale of the capital stock of the Illinois Light & Power Company, and furnished a sum sufficient to discharge all other liens and claims against the Ryan electric power plant; that Allard R. Jones informed Insull that said last mentioned contemplated agreement had been submitted to Mr. Sidney Sanderson, Counsel, and that they had virtually succeeded in obtaining at 90 of their own price [illegible],000 par value first mortgage five per cent bonds, to be issued by Illinois Light & Power Company, and [illegible] preferred stock of the same company, without any guaranty as to principal or interest by either Insull or any company, after the Illinois Light & Power Company; that said proposed agreement was along the same lines as the so-called electric service agreement "Exhibit 3", between the Power Company and the Public Service Company of July 1926, only with little more favorable to the Public

Service Company as to price of electric energy to be produced at the hydro electric plant during the term of the 50 year lease; that said proposed contract gave to Insull during its term one-half of the common stock of the Power Company; thereupon Sanderson stated that he would check up the draft of proposed leasing agreement and take up the same with Insull and report back to Willard R. and Arthur N. Powers.

That on December 17, 1925, complainants learned from an alleged representative of Veva Powers that Sanderson had completed the purchase of the Master's certificate and the same had been delivered to Insull on December 16, 1925, but were unable to obtain any information other than above set forth touching the progress, if any, in the concluding of the proposed leasing agreement; on December 18, 1925, complainants notified Insull in writing that definite action must be taken by him by January 1, 1926; that on December 19, 1925, Insull through Tobey, advised Arthur N. Powers, as complainants are informed and believe, that Insull had directed Sanderson to be in Chicago January 4, 1926, and to remain until satisfactory contracts were executed by Insull, and that meanwhile Insull desired Arthur N. Powers to induce complainants to take no legal steps in the matter against Insull; that between January 4, 1926 and February 15, 1926, negotiations in the matter were carried on, as complainants are informed and believe, almost continuously between Arthur N. Powers and Sanderson, but no definite conclusion was reached; that on February 15, 1926, at the request of Insull, Tobey, Sanderson and Arthur N. Powers met at Insull's office in Chicago, and Insull then and there, as complainants are informed and believe, declared that neither he nor his companies would enter into a contract providing for fixed payments

Service Company as to price of electric energy to be purchased from the hydro electric plant during the term of the 50 year lease; that said proposed contract were to insure during the term one-half of the common stock of the lessee company; stockholder Dunnavant stated that he would discuss the draft of proposed leasing agreement and take up the same with Donald [illegible] to Allard K. and Arthur F. Moore.

That on November 17, 1938, complainants received from an alleged representative of Vera Power that Dunnavant had completed the purchase of the Kaiser's certificate for the same, had been delivered to Insull on November 16, 1938, but were unable to obtain any information other than Moore had finished securing the signatures, if any, to the proposed leasing agreement; on December 16, 1938, complainants notified Insull in writing that definite action must be taken by him by January 1, 1939, that on December 19, 1938, Insull through Todey, defendant Arthur K. Moore, as complainants are informed and believe, that Insull had directed Anderson to [illegible] on January 4, 1939, and to remain until satisfactory conditions were assured by Insull, and that accordingly Insull desired Arthur K. Moore to inform complainants to take no legal steps in the matter against Insull; that between January 6, 1939 and February 16, 1939, negotiations in the [illegible] and co, as complainants are informed and believe, [illegible] between Arthur K. Moore and Anderson, but no satisfactory conclusion was reached; that on February 16, 1939, at the instance of Insull, Todey, Anderson and Arthur K. Moore met at Insull's office in Chicago, and Insull then and there, as complainants are informed and believe, insisted that neither he nor his companies would enter into a contract providing for fixed payments

for electric energy to be produced by the proposed hydro electric plant; that he, Insull, owned all of the capital stock of Illinois Light & Power Company and would control said proposed hydro electric plant as he chose; that Insull or the Public Service Company, as owners of the stock, would allow Arthur N. Powers to purchase and pay for out of its earnings 49% of the common stock over a period to be agreed upon, but that when Arthur N. Powers had paid for such 49% of said stock, it must be so controlled that he could not dispose of it to others; that he would be paid a salary for three years of $10,000 per annum plus other expenses in connection with the power company as should be agreed to from time to time by Insull's attorneys, Isham, Lincoln & Beale.

On March 1, 1926 complainants and Arthur N. Powers orally agreed together that legal proceedings against Insull could not and should not be longer delayed, and that there should be filed a bill of complaint in chancery; that in view of the absence of Wilbur F. Powers from the state of Illinois, it would be convenient that such bill be filed by Millard R. Powers as sole complaint, and Wilbur F. Powers be made a defendant; that Arthur N. Powers was a necessary and proper defendant thereto; that instead of putting Arthur N. Powers to the necessity of filing a cross bill in order to procure effective control of such suit when the same should be instituted, it should be agreed and was so agreed between the three Powers that Millard R. Powers should not dismiss such proposed bill without either the consent of Arthur N. Powers or full opportunity to him to file his cross bill in such proposed suit, and that Arthur N. Powers would assist in the preparation of such proposed bill to pay the cost of printing said last mentioned bill; and "further inducing said last mentioned agreement" that the interests of Arthur

for electric energy to be produced by the proposed hydro electric plant; that he, Insull, owned all of the capital stock of Illinois Light & Power Company and would control said proposed hydro electric plant as he chose; that Insull or the Public Service Company, as owners of the stock, would allow Arthur K. Powers to purchase and pay for out of its earnings 49% of the common stock over a period to be agreed upon, but that when Arthur K. Powers had paid for such 49% of said stock, it was so controlled that he could not dispose of it to others; that he would be paid a salary for three years of $10,000 per annum plus other expenses in connection with the power company as should be agreed to from time to time by Insull's attorneys, James, Lincoln & Davis.

On March 1, 1928 complainants and Arthur K. Powers orally agreed together that legal proceedings against Insull could not and should not be longer delayed, and that there should be filed a bill of complaint in chancery; that in view of the absence of Arthur K. Powers from the state of Illinois, it could be convenient that such bill be filed by William K. Powers as sole complaint, and Arthur K. Powers be made a defendant; that Arthur K. Powers was a necessary and proper defendant thereto; that instead of putting Arthur K. Powers to the necessity of filing a cross bill in order to secure effective control of such suit when the case should be instituted, it would be agreed and was so agreed between the three Powers that William K. Powers should not dismiss such proposed bill without either the consent of Arthur K. Powers or full opportunity to him to file his cross bill in such proposed suit, and that Arthur K. Powers would assist in the preparation of such proposed bill to pay the cost of printing said last mentioned bill; and "further indicating said last mentioned agreement" that the interests of Arthur

N. Powers should be protected without the necessity of filing a cross bill; that he expressed the belief that the filing of such proposed bill of complaint might so challenge the attention of Insull to the illegality of his conduct as to bring Insull to execute a reasonable contract or contracts with or through Arthur N. Powers, with whom alone Insull proposed or offered to deal, and that if Arthur N. Powers, in order to protect his interests, was compelled to and did file a cross bill in said proposed suit, Arthur N. Powers would take upon himself the onus of the institution of such suit and Insull would utilize that fact as a pretended reason for refusing to negotiate in the premises with Arthur N. Powers.

That on March 17, 1926, complainant Millard R. Powers filed his bill in chancery in the Superior Court of Cook County against Insull, Illinois Light & Power Company, Public Service Co., Wilbur F. Powers, and Edward N. Sanderson to redeem $1,000,000 capital stock and $2,500,000 of bonds of Illinois Light & Power Co. from Insull's claim of ownership, and for an accounting and other relief; that on March 18, 1926, Insull through Tobey asked complainants to name the cash sum which they would accept in compromise and dismiss the bill; that on March 18, 1926, complainants advised Insull that they would accept by way of compromise $400,000, and dismiss the bill on condition that simultaneously Insull should settle with Arthur N. Powers; that Tobey replied for Insull that he would endeavor to make a settlement with Arthur N. Powers; that from May 20, 1926 to July 5, 1926, Arthur N. Powers and Insull, through Tobey, were, as complainants were informed and believe, engaged in negotiations which resulted in part in the agreement of July 10, 1926, between Insull, Arthur N. Powers and Public Service Company, which agreement was marked "Exhibit C"; that during the last mentioned

R. Powers should be protected without the necessity of filing a cross bill; that he expressed the belief that the filing of such proposed bill of complaint might be challenge the attention of Insull to the illegality of his conduct as to using Insull to execute a reasonable contract or contracts with or through Arthur R. Powers, with whom alone Insull proposed or offered to deal, and that if Arthur R. Powers, in order to protect his interests, was compelled to and did file a cross bill in said proposed suit, Arthur R. Powers would take upon himself the onus of the institution of such suit and Insull would utilize that fact as a pretended reason for refusing to negotiate in the premises with Arthur R. Powers.

That on March 17, 1926, complainant William R. Powers filed his bill in chancery in the Superior Court of Cook County against Insull, Illinois Light & Power Company, Public Service Co., Arthur R. Powers, and Edward R. Brazieron to redeem $1,300,000 capital stock and $1,000,000 of bonds of Illinois Light & Power Co. from Insull's claim of ownership, and for an accounting and other relief; that on March 18, 1926, Insull through Today asked complainants to name the cash sum which they would accept in compromise and dismiss the bill; that on March 18, 1926, complainants advised Insull that they would accept by way of compromise $100,000, and dismiss the bill on condition that simultaneously Insull should settle with Arthur R. Powers; that Today replied for Insull that he would endeavor to make a settlement with Arthur R. Powers; that from May 13, 1926 to July 6, 1926, Arthur R. Powers and Insull, through Today, were as complainants were informed and believe, engaged in negotiations which resulted in part in the agreement of July 10, 1926, between Insull, Arthur R. Powers and Public Service Company, which agreement was marked "Exhibit D"; that during the last continued

period complainants had no direct contact with Insull, but from time to time Arthur N. Powers represented himself as reporting, and pretendedly did report fully to complainants all of his conversations with Tobey regarding matters in controversy with Tobey, representative of Insull and Public Service Co., and Arthur N. Powers; and that to secure the confidence of complainants and to throw them off their guard, pretended to report to complainants in the presence of Aldrich, and pretendedly as a part of Arthur N. Powers' conferences, and only conferences during said last mentioned period, with Arthur N. Powers' own attorney, Charles M. Aldrich, and sought in the presence of complainants or one of them, the advice of Aldrich; that by ~~June~~ July 5, 1926, and thereafter complainants believed that they were fully informed as to the terms of the provisions of Exhibit C, and of a so-called electric service agreement between Illinois Light & Power Co. and the Public Service Co., being Exhibit E, while in truth there were substantial terms of Exhibit C, D and E which were not disclosed but were concealed by Arthur N. Powers from complainants; that on July 5, 1926, Arthur N. Powers advised complainants in the presence of Aldrich that Tobey had agreed, for Insull, upon the terms of the three contracts, aforesaid, excepting as to the actual price to be paid by the Public Service Company for electric energy, and that the same did not include provision for payment of any part of $400,000 to complainants; that Insull would not and so declared, pay that sum to complainants and would not deal with them except through Arthur N. Powers, and that it was a condition that contracts would not be executed until Arthur N. Powers should procure releases by complainants to Insull and others, and also a stipulation by Millard H. Powers to dismiss his chancery suit without costs; that Arthur

period complainants had no direct contact with Insull, but from time to time Arthur K. Power represented himself as reporting, and presumedly did report fully to complainants all of his conversations with Tobey regarding matters in controversy with Tobey, representative of Insull and Public Service Co., and Arthur K. Power; and that to secure the confidence of complainants and to throw them off their guard, pretended to report to complainants in the presence of Aldrich, and pretendedly as a part of Arthur K. Power's conferences, but only conferences during said last mentioned period, with Arthur K. Power's own attorney, Charles H. Aldrich, and sought in the presence of complainants or one of them, the advice of Aldrich; that by June 2, 1926, and thereafter complainants believed that they were fully informed as to the terms of the provisions of Exhibit C, and of a so-called electric service agreement between Illinois Light & Power Co. and the Public Service Co., being Exhibit E, while in truth there were substantial terms of Exhibit C, D and E which were not disclosed but were concealed by Arthur K. Power from complainants; that on July 8, 1926, Arthur K. Power advised complainants in the presence of Aldrich that Tobey had agreed, for Insull, upon the terms of the three contracts, also said, excepting as to the actual price to be paid by the public service company for electric energy, and that the p ce did not include provision for payment of any part of $600,000 to complainants; that Insull would not and do declared, by that sum to complainants and would not deal with them except through Arthur K. Power, and that it was a condition that contracts could not be executed until Arthur K. Power should procure releases by complainants to Insull and others, and also a exculpation by Arthur K. Power to dismiss his chancery suit without costs; that Arthur

N. Powers was by said contracts required to assume certain indebtedness to Insull, including Insull's lien on the capital stock of Illinois Light & Power Co. and the amount paid by him to purchase the certificate of sale from Veva Powers, but exclusive of any payments to complainants, amounting to a half a million dollars; that Arthur N. Powers had no means of paying anything to complainants except prospective income from the common capital stock of Illinois Light and Power Company, and possibly salary as president; that Insull under the terms of said last mentioned contracts would have control of the majority of the Board of Directors of Illinois Light & Power Company during the period of construction of the proposed hydro electric plant, and Insull also insisted that the plant should be constructed by Sanderson & Porter, who operated only on a cost plus basis; that such plant would cost substantially all of the proceeds amounting to five and one half million dollars of bonds and preferred stock, as above mentioned; that the Illinois Light & Power Company was required to pay $12,000 a year for interference with the Kankakee and Wilmington plants of the Public Service Company, and that $90,000 was to be allowed the Public Service Company as compensation for and disbursements in operating said plant for a period of fifty years, and Arthur N. Powers had difficulty in inducing Insull to agree upon a price to be paid by the Public Service Company for electric energy, etc.; that the charges were so high that about all Arthur N. Powers would get out of the enterprise was the satisfaction of being identified with the completion of the proposed hydro electric plant and the possible ultimate realization of a sufficient amount to pay the one half million dollars above mentioned; that if complainants would execute and deliver the releases provided for in the contract of February 21, 1925, exchange mutual releases with Sanderson & Porter, and dismiss

A. Powers was by said contracts required to assume certain indebtedness to Insull, including Insull's lien on the capital stock of Illinois Light & Power Co. and the amount paid by him to purchase the certificate of sale from Vera Ro ers, but exclusive of any payments to complainants, amounting to a total a million dollars; that Arthur K. Powers had no means of paying anything to complainants except prospective income from the common capital stock of Illinois Light and Power Company, and possibly salary as president; that Insull under the terms of said last mentioned contracts would have control of the majority of the board of directors of Illinois Light & Power Company during the period of construction of the proposed hydro electric plant, and Insull also insisted that the plant should be constructed by Sanderson & Porter, who operated only on a cost plus basis; that such plant could substantially all of the proceeds amounting to five and one half million dollars of bonds and preferred stock, as above mentioned; that the Illinois Light & Power Company was required to pay $40,000 a year for interference with the business and elimination plants of the Public Service Company, and that $40,000 was to be charged the Public Service Company as compensation for all eliminations in operating said plant for a period of fifty years, and either K. Powers had difficulty in inducing Insull to agree upon a price to be paid by the Public Service Company for electric energy, etc.; that the charges were so high that under all arrangements A. Powers would get out of the enterprise as the situation of being identified with the promotion of the proposed hydro electric plant and the possible attempt rehabilitation of a sufficient amount to pay the one half million dollars above mentioned; that if complainants would execute the deficit to releases provided for in the contract of February 1, 1928, exchange mutual releases with Sanderson & Porter, and indemnifying

Millard R. Powers' bill against Insull and others, Insull would release Millard R. Powers and surrender to him all his notes then held by Insull, and Arthur N. Powers would pay $150,000 to complainants ($100,000 to Millard R. Powers and $50,000 to Wilbur F. Powers), as provided in the unexecuted contract of February 1, 1925, and would pay the additional sum of $2,000 to Millard R. Powers and $10,000 of the amount so offered to be paid to Millard R. Powers, Arthur N. Powers would pay soon after Insull should execute contracts in the premises, the balance with interest at the rate of 6% per annum from July 1, 1926 to be paid in monthly installments of $500 until the hydro electric plant was completed, and would apply to the payment thereof all earnings Arthur N. Powers might realize over and above a small salary allowance; that Arthur N. Powers would also furnish Millard R. Powers free of rent reasonable office accomodations for the practice of the law, and give him the legal business arising from land purchases and other activities incidental to the erection of the hydro electric plant; that on account of the $50,000 to be paid Wilbur, Arthur would pay Wilbur as soon as Insull executed contracts $5,000 with interest from February 21, 1925, at 6%, and the balance of the $50,000 from surplus of income after operation of the proposed hydro electric plant commenced, and would possibly employ Wilbur F. Powers as engineer during the construction period and pay him a salary of $1000 a month; that Arthur further stated that he knew his last proposition and offer would be a disappointment to complainants, but it was the best he could submit, and if such offer was not accepted by complainants all negotiations with Arthur N. Powers and with complainants would be declared off by Insull; that Insull was very much incensed with Millard R. Powers for starting his suit against him and

William H. Powers' oral opinion (Result was obtained, would
could release William H. Powers and attorney to his ill health
notes then held by Insull, and Arthur L. Powers would pay
$180,000 to complainants (Lib)[illegible] to William H. Powers and
$80,000 to Albert H. Powers, as provided in the settlement
contract of February 1, 1918, but would pay the debts and
of $[illegible],000 to William H. Powers and $[illegible] of the amount to
offered to be paid to Albert H. Powers, Arthur H. Powers
would pay some after Insull should receive corporate in the
premises, the balance with interest [illegible] of [illegible]
shown from May 1, 1932 to [illegible] monthly installments
of $[illegible] until the hydro electric [illegible] paid, and
would apply to the payment thereof all earnings. Arthur H. Powers
might realize over and above a small salary allowance; that
Arthur H. Powers would also furnish William H. Powers free of
rent reasonable office accommodations for the practice of the
law, and give him the [illegible] business [illegible] from time to time
and other activities incident to the execution of the hydro
electric plant; that on account of the [illegible] to be paid [illegible],
Arthur would pay [illegible] a [illegible] [illegible]
$3,000 with interest from January [illegible], 1932 [illegible]
balance of the $[illegible] plus earnings of [illegible]
of the pre-used hydro [illegible] and [illegible]
employ William H. Powers as engineer during the construction period
and pay him a salary of $[illegible] a month; that Powers further
stated that he made his last presentation [illegible]
disappointment to complainants; [illegible] the [illegible]
submit, and if such offer was not [illegible] by [illegible]
all negotiations with Arthur H. Powers [illegible]
be declared off by Insull; that Insull [illegible] very [illegible]
with William H. Powers for advising his suit against [illegible]

unless the same was promptly dismissed would employ able counsel and litigate with him, whom they knew was about 77 years of age, as long as he lived and that he would never get a dollar out of anybody; that it would be unwise for complainants to attempt to interview or negotiate with Insull or Tobey because of the declared attitude of Insull against him; that in the course of such conversation between Millard R. and Arthur N. Powers of July 5, 1926, Millard asked for copies of the said last proposed contract in order to formulate a report in the premises in detail, but Arthur stated that he had no copies; that he had left his copies with a bond house with which he was negotiating; that Arthur never furnished complainants for their inspection any such copies, but on July 6, 1926, at a further interview between Millard and Arthur, Arthur repeated the representations in regard to payment, and then again it was suggested that Millard R. Powers be allowed to see Insull or Tobey in an endeavor to induce Insull to make a cash payment, etc., and that Arthur replied that any such interview would be fruitless and probably endanger all that he had accomplished; that Arthur N. Powers fraudulently concealed the true state of facts and either deceived said Charles H. Aldrich as well as Millard R. Powers, or secretly and unknown to complainants did confer in the premises with Aldrich as Arthur N. Powers' attorney; that Insull and Arthur N. Powers on June 30, 1926, agreed upon all the terms of the contracts, Exhibits C. D. and E, including the price to be paid by Public Service Company for electric energy, and that contract, Exhibit C, did include provisions for payment of complainants at least in part; as they are informed and believe and charge the fact to be, said contract provided for a loan by Insull to Arthur N. Powers of $125,000, the disposition of only $17,000 of which was fixed by said contract, and the balance of

unless the case was promptly dismissed would employ this counsel and litigate with him, whom they knew was known 17 years old and, as long as he lived and that he would never get a dollar out of anybody; that it would be unwise for complainants to at least to interview or negotiate with Israel or Tobey because of the declared attitude of Israel against him; that in the matter of such conversation between Allred A. and Arthur R. on or of July 5, 1936, Allred asked for copies of the said last proposed contract in order to formulate a report in the premises in detail, but Arthur stated that he had no copies; that he had left his copies with a bond house with which he was negotiating; that Arthur never furnished complainants for their inspection any such copies, but on July 6, 1936, at a further interview between Allred and Arthur, Arthur requested the complainants in regard to payment, and then again it was suggested that Allred R. Torres be allowed to see Israel or Tobey in an endeavor to induce Israel to make a cash payment, etc., but that Arthur replied that any such interview would be fruitless and probably endanger all that he had accomplished; that Arthur R. Torres fraudulently concealed the true state of facts and wilfully deceived said Charles R. Aldrich as well as Allred A. [illegible] or secretly and unknown to complainants or owner in [illegible] premises with Aldrich or Arthur R. [illegible] attorney; that Israel and Arthur R. Torres on June 27, 1936, entered into the terms of the contracts, Exhibits C, D, and E, including the price to be paid by Public Service Company for electric energy, and that contract, Exhibit C, did include provision for payment of complainants at least in part; as they are informed and believe and charge the fact to be, said contract executed by Israel to Arthur R. Torres of 1936, C, the disposition of only $17,000 of which was fixed by said contract, and the balance of

$108,000 was intended, as agreed between Insull and Arthur N. Powers, to be used by Arthur N. Powers to pay to that extent the claims and demands of complainants; that none of said contracts, Exhibits C. D, and E, provided that they would not be executed by the parties thereto until or unless Arthur N. Powers should procure from complainants releases of Arthur N. Powers in the amounts theretofore mentioned; that Arthur N. Powers at all times knew that two and one half mills per kilowatt hour and a total payment of $30,000 per month was sufficient to produce from the probable output of said hydro electric plant, an average output of ninety million kilowatt hours, upwards of $585,000, and would net to Illinois Light & Power Company over and above carrying charges, an income available for the payment of dividends on the common stock of upwards of $200,000 per annum; and it is averred that Insull had not declared that unless the offers of settlement by Arthur N. Powers to complainants were accepted, all negotiations with complainants would be declared off; but that at most had only declared that all such negotiations would be declared off by Insull unless complainants accepted what in said Insull's judgment was a reasonable cash settlement of $250,000; that on July 10, 1926, at Chicago, complainants relying upon the false representations of Arthur N. Powers and induced by the prior acts and doings of Insull and in ignorance of the true situation, did orally accept and orally communicate to Arthur N. Powers complainants' acceptance and orally authorized Arthur N. Powers to deliver the releases by Millard R. and Wilbur F. Powers releasing Arthur N. Powers & Co., Arthur N. Powers, Insull, Public Service Co., and Illinois Light & Power Company, and that they would execute written releases between complainants and Sanderson & Porter, and Millard R. Powers did execute a stipu-

$[illegible]$,000 was intended, in excess between [illegible] [illegible] [illegible]

lation with all parties defendant therein to dismiss his said chancery suit without costs; that on July 10, 1926, Arthur N. Powers delivered the releases to the parties therein named and the stipulation to dismiss the Millard R. Powers suit; that such proceedings were had in the Millard R. Powers suit that the same, as agreed in the stipulation, was then and there dismissed without costs; that on the last mentioned date Insull, Arthur N. Powers and Public Service Co. executed the contract, Exhibit C. As complainants have learned since the institution of the Millard R. Powers' suit, thirty days prior thereto, Insull and Arthur N. Powers entered into a fourth written contract, relating in ways unknown to complainants, but as they are informed and believe and charge, which materially affect complainants' rights in the premises, the existence of which was fraudulently concealed by Arthur N. Powers in co-operation with Insull, the discovery of which complainants seek and demand.

That complainants' acceptance of Arthur N. Powers' offer and delivery by them on July 10, 1926, of the releases above recited, was a direct and natural outcome of the conspiracy of January 21, 1921, and the acts and doings of Insull pursuant thereto.

It is charged that the execution of the contract, Exhibit C, by Insull and others, and of said contract, Exhibit E, were as between Insull and complainants in law and effect executions for and in behalf and for the use of complainants and in fulfillment and performance by complainants of the contract of December 21, 1920, between them and Arthur N. Powers, and that complainants' releases, Exhibits F, and G, so far as affecting Illinois Light & Power Co., Insull and Public Service Co., were in effect and should be construed in equity, as but the consent

lation with all parties defendant therein to dismiss his entire chancery suit without costs; that on July 10, 1926, Arthur R. Powers delivered the release to the parties therein named and the stipulation to dismiss the Millard R. Powers suit; that such proceedings were had in the Millard R. Powers suit that the same, as agreed in the stipulation, was then and there dismissed without costs; that on the last mentioned date Insull, Arthur R. Powers and Public Service Co. executed the contract, exhibit G, as complainants have learned since the institution of the Millard R. Powers' suit, thirty days prior thereto; Insull and Arthur R. Powers entered into a fourth written contract, writing in ways unknown to complainants, but as they are informed and believe and charge, which materially affect complainants' rights in the premises, the existence of which was fraudulently concealed by Arthur R. Powers in co-operation with Insull, the discovery of which complainants seek and demand.

That complainants' acceptance of Arthur R. Powers' offer and delivery by them on July 10, 1926, of the release above recited, was a direct and natural outcome of the conspiracy of January 21, 1921, and the act, and failure of Insull, mentioned therein.

It is charged that the execution of the contracts, exhibit G, by Insull and others, and of said contract, exhibit G, were as between Insull and complainants in law and fact executions for and in behalf and for the use of complainants in fulfillment and performance by complainants of the contract of December 21, 1920, between them and Arthur R. Powers, and that complainants' release, exhibits F, and G, so far as affecting Illinois Light & Power Co., Insull and Public Service Co., were in effect and should be construed in equity, as but the consent

of complainants to the terms and provisions of the contracts, Exhibits C, D and E, and as to Arthur N. Powers the releases should be construed in equity (and otherwise should be canceled) as powers of attorney to Arthur N. Powers to negotiate and execute the contracts, Exhibits C. D and E, for the use and benefit of complainants, and that Insull, Arthur N. Powers and Public Service Company are estopped so to deny.

On July 10, 1926, Arthur N. Powers delivered to complainants a release to them by Sanderson & Porter, and a joint note of Millard R. and Arthur N. Powers for $137,000, theretofore held by Insull, and a note of Millard R. Powers for $5000, likewise held by Insull, and paid Millard R. Powers $10,000 and Wilbur F. Powers $5400; that commencing August 1, 1926, and ending January 1, 1927, on the first day of each month, Arthur paid Millard R. Powers $500 per month; in addition thereto Arthur N. Powers, between July 1, 1926 and February 11, 1927 paid to Wilbur F. Powers the total sum of $1725, on account of services as engineer performed by him pursuant to the offer of Arthur and the acceptanceothereof by complainants; that between July 10, 1926 and March 3, 1927, Arthur paid Millard R. Powers a total of $1809 for professional services rendered by him as attorney, pursuant to the former offer and acceptance thereof. These are the only amounts Arthur N. Powers paid complainants pursuant to said offer and acceptance. On March 5, 1927, Arthur N. Powers refused to make any further payments to complainants unless they and each of them would agree to cancel and release all obligations and liability of Arthur N. Powers to complainants, and leave to Arthur N. Powers all question of further payments by him to complainants, and complainants refused so to agree.

of complainants to the terms and provisions of the contracts, Exhibits C, D and E, and as to Arthur K. Lowers the relationship should be construed in equity (and otherwise should be canceled) as powers of attorney to Arthur K. Lowers to negotiate and accounts the contracts, Exhibits C, D and E, for the use and benefit of complainants, and that Lowers, Arthur K. Lowers and Public Service Company are estopped so to deny.

On July 10, 1928, Arthur K. Lowers delivered to complainants a release to them by Sanderson & Porter, and a joint note of Milliard E. and Arthur K. Lowers for $27,000; thereafter paid by Insull, and a note of Milliard E. Lowers for $[illegible], likewise paid by Insull, and paid Milliard E. Lowers $[illegible] and Arthur K. Lowers $8400; that commencing August 1, 1928, and ending January 1, 1927, on the first day of each month, Arthur paid Milliard E. Lowers $800 per month; in addition thereto Arthur K. Lowers, between July 1, 1928 and February 11, 1927 paid to Arthur K. Lowers the total sum of $[illegible], on account of services as engineer performed by him pursuant to the offer of Arthur and the acceptance thereof by complainants; that between July 10, 1927 and March 3, 1927, Arthur K. Lowers [illegible] a total of $1800 for professional services rendered by him as attorney, pursuant to the letter offer and acceptance thereof. These are the only amounts Arthur K. Lowers [illegible] complainants [illegible] to his offer and acceptance. On March 3, 1927, Arthur K. Lowers refused to make any further payments to complainants under they and each of them paid prior to March and [illegible] obligations and liability of Arthur K. Lowers to complainants, and leave to Arthur K. Lowers all questions of further payment by him to complainants, and complainants refused so to agree.

On March 15, 1927, Arthur in writing represented to complainants in substance that the unexecuted contract of February 21, 1925, had been executed and was then and there in force; that complainants had failed to carry out said contract; that a further opportunity would be provided complainants by Arthur to fully perform the pretended contract, and that in default all rights and interests of complainants would cease; that on March 15, 1927, complainants began to suspect that the false representations made by Arthur were possibly not true; that thereafter on May 5, 1927, complainants first procured copies of the contracts, Exhibits C, D and E, and first learned that the representations of Arthur as to their terms and provisions were false, and first learned the provisions of Exhibit C for the advance of $125,000 to Arthur and of the payment thereof to him on June 30, 1926, as recited in Exhibit C; that on May 9, 1927 Andrew Stevenson, Elliot C. Williams, Lee D. Mathias and Charles H. Aldrich filed a voluntary petition in bankruptcy against Arthur N. Powers in the District Court of the United States for the Northern District of Illinois in the eastern division thereof, which was then pending.

On information from the Secretary of the State of Illinois, the officers and directors of the Illinois Light & Power Co. are Ben H. Matthews, President, Charles H. Seeberger, Secretary, and George H. Jones, Treasurer; and the directors are Ben H. Matthews, Charles D. Albright, Edward N. Bullard, Helen E. Moore, John E. Etzkorn, Charles H. Seeberger, and Arthur N. Powers, and with possibly one exception are such officers in pursuance of the provisions of contract, Exhibit C; that Seeberger is the nominee of Arthur N. Powers and dominated by him; Ben H. Matthews and George H. Jones are nominees of and dominated by Insull. By whom Helen E. Moore and John E. Etzkorn

On March 15, 1927, Arthur in writing represented to complainants in substance that the unexecuted contract of February 21, 1925, had been executed and was then and there in force; that complainants had failed to carry out said contract; that a further opportunity would be provided complainants by Arthur to fully perform the pretended contract, and that in default all rights and interests of complainants would cease; that on March 15, 1927, complainants began to suspect that the false representations made by Arthur were possibly not true; that thereafter on May 2, 1927, complainants first procured copies of the contracts, exhibits C, D and E, and first learned that the representations of Arthur as to their terms and provisions were false, and first learned the provisions of Exhibit C for the payment of $125,000 to Arthur and of the payment thereof to him on June 30, 1926, as recited in Exhibit C; that on May 2, 1927 Andrew Stevenson, Elliot C. Williams, Leo C. Mathias and Charles E. Ashton filed a voluntary petition in bankruptcy against Arthur R. Powers in the District Court of the United States for the Northern District of Illinois in the Eastern division thereof, which was then pending.

On information from the Secretary of the State of Illinois, the officers and directors of the Illinois Light & Power Co. are Ben H. Matthews, President, Charles W. Seabrooke, Secretary, and George W. Jones, Treasurer; and the directors are Ben H. Matthews, Charles G. Albright, Alfred K. Mulford, Helen R. Moore, John W. Stanton, Charles B. Seabrooke, and Arthur R. Powers, and with possibly one exception the same officers in pursuance of the provisions of contract, Exhibit C; that Seabrooke is the nominee of Arthur R. Powers and dominated by him; Ben H. Matthews and George W. Jones are nominees of and dominated by Insull. By whom Helen R. Moore and John W. Stanton

were elected directors complainants know not, but charge on information and belief that one of them is dominated by Insull and the other by Arthur N. Powers; that Insull dominates and controls all the activities of Illinois Light & Power Company under or pursuant to contracts, Exhibits C, D and E, and Arthur N. Powers has become a mere figure head in its affairs, without authority or power except as directed by Insull. Complainants are informed and believe and charge that Insull still plans, pursuant to the conspiracy of June 15, 1911, unlawfully to deprive Arthur N. Powers and complainants (the real parties in interest) of legitimate profit and benefits otherwise accruable under contracts, Exhibits C, D and E, nominally to Arthur N. Powers, but rightfully and equitably to complainants; that pursuant to the last mentioned conspiracy, complainants are informed and believe, and therefore charge, Insull has prevented Illinois Light & Power Co. and Public Service Co. from formally executing contract, Exhibit E, which ommission has prevented Illinois Light & Power Co. to acquire any funds of its own and thus left it dependent upon Insull for funds with which to prosecute said enterprise and build the hydro electric plant, and thereby Insull has personally been put in a position to further dictate all its activities; that he has dictated the personnel of all employees of said Illinois Light & Power Co., including the purchase of lands required for said enterprise through whom, in turn the prices of all lands purchased are, in the nature of things, largely determined and upon whom, said Illinois Light & Power Co. is largely dependent for knowledge of prices actually paid for lands purchased in the prosecution of said enterprise, and in like manner and by the same means Insull has been enabled to and has directed that lands so purchased for said enterprise should be purchased and

were elected directors complainants know not, but judge on information and belief that one of them is dominated by Insull and the other by Arthur K. Powers; that Insull dominates and controls all the activities of Illinois Light & Power Company under or pursuant to contracts, Exhibits A, B and C, and Arthur K. Powers has become a mere figure head in the Illinois without authority or power except as directed by Insull. Complainants are informed and believe and charge that Insull still plans, pursuant to the conspiracy of June 16, 1911, unlawfully to deprive Arthur K. Powers and complainants (the real parties in interest) of lucrative profits and benefits otherwise accruable under contracts, Exhibits A, B and C, nominally to Arthur K. Powers, but rightfully and constructively to complainants; that pursuant to the later mentioned conspiracy, complainants are informed and believe, and therefore charge, Insull has prevented Illinois Light & Power Co. and Illinois Service Co. from formally executing contract, Exhibit E, which commission has prevented Illinois Light & Power Co. to procure any funds of its own and, thus left it dependent upon Insull for funds with which to prosecute said enterprise and build the hydro electric plant, and thereby Insull has personally been put in a position to further dictate all its activities; that he has dictated the personnel of all employees of said Illinois Light & Power Co., including the purchase of trade fixtures for said enterprise through whom, in turn the prices of all goods purchased are, in the nature of things, largely determined and upon whom, said Illinois Light & Power Co. is largely dependent for knowledge of prices actually paid for goods purchased in the prosecution of said enterprise, and in this manner and by the same means Insull has been enabled to and has dictated the lands to be purchased for said enterprise should be purchased and

the titles thereto taken in the names of individuals nominated, selected and dominated by Insull; that George R. Jones, the treasurer, is not only the nominee of Insull but an employee of Insull and Treasurer of the Public Service Co., and complainants charge that the only records that have been or are being kept of monies advanced by Insull or for the disbursement of funds of Illinois Light & Power Co. are the records which have been kept or are being kept by or under the supervision of George R. Jones, dominated by Insull; that no systematic, adequate or effective supervision or control of the affairs of said power company in its own interest or in the interest of the holders of its common stock is now being exercised or is now possible under existing conditions, except as it is had from or through Insull or those appointed and selected by him; that by reason thereof Insull is in a position at any time, at his own whim, to cut off indefinitely all financial resources of said Illinois Light & Power Co., however critical to its interest such financial resources might then be to it, and complainants charge on information and belief that unless prevented by order of court Insull will, in manners unknown to or possible to be anticipated by complainants, take advantage of the situation as hereinabove set forth, to carry out and fully effect said conspiracy of June 15, 1911, to formally terminate and take over to himself all interest of complainants in the premises as the real parties in interest; that by the terms of the contracts, Exhibits C, D and E, there is an obligation, nominally upon Arthur N. Powers, to Insull, for Insull's or Public Service Co.'s use and benefit, totalling $375,000, which includes $125,000 advanced by Insull to Arthur N. Powers on June 30, 1926; that except for payments of a total of $17,000 to Aldrich and L. D. Mathias, as provided in said contract, Exhibit C, and excepting also possible payments by

the title thereto taken in the names of individuals nominated, selected and dominated by Insull; that George W. Jones, the treasurer, is not only the business of Insull but an employee of Insull and treasurer of the Public Service Co., and complainants charge that the only records that have been or are being kept of monies advanced by Insull or for the disbursement of funds of Illinois Light & Power Co. are the records which have been kept or are being kept by or under the supervision of George W. Jones, dominated by Insull; that no systematic, adequate or effective supervision or control of the affairs of said power company in its own interest or in the interest of the holders of its common stock is now being exercised or is now possible under existing conditions, except as it is done from or through Insull or those appointed and selected by him; that by reason thereof Insull is in a position at any time, of his own will, to cut off immediately all financial resources of said Illinois Light & Power Co., however critical to its interest such financial resources might then be to it, and complainants charge on information and belief that unless prevented by order of court Insull will, in manner unknown to or possible to be anticipated by complainants, take advantage of the situation as it eminently set forth, to carry out an injury filled and conspiracy of long in, 1911, to formally retaining the site over to element Mr. Insull of complaints in the premises in the year notice in interest; that by the terms of the contracts, Exhibits A, B and C, there is an obligation, nominally upon Mr. Insull, to insull, for Insull's or Public Service Co.'s use the sum benefit, the sum $279,000, which includes $138,000 advanced by Insull to Mr. Jones on June 30, 1926; that except for payments on total of $17,000 to Mr. Jones and I. S. Robins, as provided in said contract, Exhibit C, and excepting also certain payments by

Arthur N. Powers to complainants, Arthur N. Powers, as complainants are informed and believe and charge the fact to be, has appropriated said $125,000 to his own use and spent or dissipated the same for his own and his immediate family's living and entertainment, but nevertheless complainants offer to do full equity in the premises and are willing, and do hereby offer to assume all obligations under said last mentioned contract for the payment of $375,000 including $125,000 advanced to Arthur N. Powers, and to accept and perform the terms and conditions of contracts, Exhibits C, D and E, (assuming the substitution therein of complainants for Arthur N. Powers), and in all respects to carry out (on the same assumption) each and all of the conditions, provisions and obligations incumbent thereunder upon Arthur N. Powers, and upon substitution in said last mentioned contracts of complainants for Arthur N. Powers, to release and discharge Arthur N. Powers from all payments and obligations to complainants of any character or description.

Paragraph 23 of contract, Exhibit C, provides that said last mentioned contract was made by Insull for convenience and while he is bound by it, it is understood that he is in reality acting for the Public Service Co. and Commonwealth Edison Co., and that these companies are ultimately to receive any benefit to be derived by Insull under the last mentioned contract; that except as otherwise indicated in the bill, complainants are ignorant of just what interest, present or intended, Commonwealth Edison Company has in the premises, and whatever such interest may be, the same is subject to the rights and interests of complainants.

The amended bill prays that defendants may be compelled to answer etc.; that the execution of contract, Exhibit C, by

Arthur A. Powers to complainants, Arthur A. Powers, as complainants are informed and believe and therefore do not plead to on, but appropriated said $125,000 to his own use and spent or disposed the same for his own and his immediate family's living and maintenance, but nevertheless complainants offer to do full equity in the premises and are willing, and do hereby offer to assume all obligations under said last mentioned contract for the payment of $375,000 including $125,000 advanced to Arthur A. Powers, and to accept and perform the terms and conditions of contract, Exhibits 2, 3 and 4, (assuming the substitution therein of complainants for Arthur A. Powers), and is all necessary to carry out (on the same assumption) each and all of the conditions, provisions and obligations incumbent thereunder upon Arthur A. Powers, and upon substitution in said last mentioned contract of complainants for Arthur A. Powers, to release and discharge Arthur A. Powers from all payments and obligations to complainants of any character or description.

Paragraph 22 of contract, Exhibit 2, provides that said last mentioned contract was made by Powell for convenience and which is borne by it, it is understood that he is a reality acting for the Public Service Co. and Commonwealth Edison Co., and that these companies are ultimately to realize any benefit to be derived by them, under the last mentioned contract; that except as otherwise indicated in this bill, complainants are ignorant of just what interest, present or intended, Commonwealth Edison Company has in this transaction, but whatever such interest may be, the same is subject to the rights and interests of complainants.

The amended bill prays that defendants may be compelled to answer etc.; that the execution of contract, Exhibit 2, by

Insull and Public Service Co. be found and decreed to be, as between Insull and complainants, performance by Insull of his contract and agreement of August 9, 1911; that the execution of contract, Exhibit C, by Arthur N. Powers be found and decreed to be, as between complainants on the one hand and Arthur N. Powers, Insull, Public Service Co. and Commonwealth Edison Co. on the other hand, on behalf and for the use of complainants and in fulfillment and performance by them of the contract of December 21, 1920, between complainants and Arthur N. Powers; that complainants' releases, Exhibits F and G, so far as affecting the Illinois Light & Power Co., Insull and Public Service Co., or the cancellation of then outstanding bonds of Illinois Light & Power Co. be found decreed to be the consents of complainants to the terms and provisions of said contracts Exhibits C, D and E, other than the terms and provisions of the same, if any, purporting or operating to deprive complainants of their interests in the premises in favor of and for the benefit of Arthur N. Powers, and that complainants' releases, Exhibits F and G, insofar as in terms releases by complainants of or to Arthur N. Powers, be found and decreed (on such terms as to the court may seem meet, complainants offering, as aforesaid, to do full equity in the premises, not only to Arthur N. Powers, but to each and all of the defendants) to be powers of attorney to Arthur N. Powers to negotiate and execute said contracts, Exhibits C, D and E, etc., and for other and different relief, as equity may require.

The exhibits referred to in the several bills are set out in <u>haec verba</u> in the abstract and cover thirty-three pages thereof. It would unduly and unnecessarily extend this statement to again recite their several contents and moreover we deem so to do unnecessary for the reason that all the material

Insull and Public Service Co. as found [illegible], as between Insull and complainants, performance by Insull of his contract and agreement of August 9, 1911, that the execution of contract, Exhibit C, by Arthur S. [illegible] be found and decreed to be, as between complainants on the one part and Arthur S. Towers, Insull, Public Service Co. and Commonwealth Edison Co. on the other hand, on behalf and for the use of complainants and in fulfillment and performance by them of the contract of December 21, 1907, between complainants and Arthur S. Towers; that complainants' releases, Exhibits 5 and 6, so far as affecting the Illinois Light & Power Co., Insull and Public Service Co., or the cancellation of then outstanding bonds of Illinois Light & Power Co. be found and decreed to be the consents of complainants to the terms and provisions of said contracts Exhibits B, C and D, other than the terms and provisions of the same, if any, affecting or operating to deprive complainants of their interests in the premises in fraud of and for the benefit of Arthur S. Towers, and that complainants' releases, Exhibits 5 and 6, insofar as in terms releasing or compromising of or to Arthur S. Towers, be found and decreed (in such terms as to the court may seem meet, [illegible]) to be [illegible] in the premises, not only [illegible] Towers, but to each and all of the defendants, [illegible] of attorney to Arthur S. Towers [illegible] contracts, Exhibits B, C and D, etc., [illegible] different relief, as equity may require.

The [illegible] reference [illegible] were set out in haec verba in the decree [illegible] pages thereof. [illegible] statement to again recite [illegible] we have go to do [illegible] for [illegible]

parts thereof and all that is claimed in virtue of them are set forth in the averments of complainants pleadings, which are included in this statement. However, in arriving at our opinion we have read all of the exhibits and verified them with the averments and claims made in the pleadings as to their purport and legal effect.

parts thereof and all that is claimed in virtue of them are set forth in the averments of complainants pleadings, which are included in this statement. However, in arriving at our opinion we have read all of the exhibits and verified them with the averments and claims made in the pleadings as to their purport and legal effect.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Counsel for defendants contend that if the bill fails as against Arthur N. Powers and Samuel Insull, every other defendant is relieved of any liability to complainants. In the inception of this opinion we will state that we concur in this contention, and shall confine the reasons of our opinion to a setting forth of the relations between these two defendants and complainants without reference to the actions and doings or interests of any of the other defendants, as in our ultimate conclusion we shall hold that the bills state no case against Arthur N. Powers and Samuel Insull which entitle complainants to any relief as against them, either jointly or severally in a court of equity, and that the bills were obnoxious to the demurrers interposed to them and sustained by the chancellor.

The sequence of events to be extracted from the foregoing statement is about as follows:

Millard N. Powers, the lawyer, with his two sons Arthur and Wilbur, entered the field of public utility in the enterprise of constructing on the Kankakee River a hydro electric power plant. This required large expenditures of money which at times not being forthcoming, proved an obstruction to success. They needed five million dollars to stabilize the enterprise. After 1913 they met with financial embarrassment. Lack of the necessary money and experience were obstacles jeopardizing success. Insull was a competitor. An alliance was sought by Millard with Insull, who told him orally that if he, Millard,

MR. JUSTICE HOLMES delivered the opinion of the court.

Counsel for defendants contend that if the bill fails as against Arthur K. Powers and Samuel Insull, every other defendant is relieved of any liability to complainants. In the inception of this opinion we will state that we concur in this contention, and shall confine the reasons of our opinion to a setting forth of the relations between these two defendants and complainants without reference to the notions and doings or interests of any of the other defendants, as in our judgment conclusion we shall hold that the bills state no case against Arthur K. Powers and Samuel Insull which entitle complainants to any relief as against them, either jointly or severally in a court of equity, and that the bills were dismissed as the demurrers interposed to them had sustained by the chancellor.

The sequence of events to be extracted from the foregoing statement is about as follows:

Willard K. Powers, the lawyer, with his two sons Arthur and Gilbert, entered the field of public utility in the enterprise of constructing on the Kankakee River a hydro electric power plant. This required large expenditures of money which at times not being forthcoming, proved an obstruction to success. They needed five million dollars to stabilize the entire plan. After 1912 they met with financial embarrassment. Lack of the necessary money and experience were obstacles jeopardizing success. Insull was a competitor. An alliance was sought by Willard with Insull, who told him crisply that if he, Willard,

would construct a power plant on the Kankakee River, that he, Insull, would purchase the output at a price less than Insull's cost of production, which was not hydro. This he, Powers, endeavored unsuccessfully to do. In this attempt he borrowed of Insull between the years 1913 and 1916 $137,000, payment of which was evidenced by Millard's notes. He failed, however, to pay either principal or interest. These notes were secured by stock of the Illinois Light & Power Company. Later Veva Powers acquired a second lien on the stock pledged to Insull. She filed a bill to redeem, to which bill complainants were parties. A decree was obtained by her in that suit establishing her lien to the extent of $30,000, and directing a sale of the shares. Millard promised Arthur to discharge Veva's and Insull's liens. This he failed to do, whereupon the shares were offered for sale by a Master, and Veva bought them. Millard R. Powers was at that time indebted to Insull in the sum of $195,000. This he likewise failed to pay. Arthur was jointly liable with his father to pay the debt to Insull. In 1926 Arthur had negotiations with Insull with a view to paying this debt. Thereupon Millard filed a bill to redeem. He made no tender of payment of the debt admitted to be due. At this junction Arthur sought to make a contract with Insull for an interest in the stock. This Insull would not do until Millard's bill was out of the way. Millard refused Arthur's importunities to dismiss his bill to redeem, or to give a release to Insull unless Arthur promised to pay him $150,000. Arthur thereupon paid Millard $20,000, which he obtained from Insull. Arthur's payments to Millard continued until Arthur's creditors had him adjudicated a bankrupt. The filing of the bill in this case was the final act of Millard. The filing, however, was subsequent to the giving of the releases by Millard and ~~Arthur~~ Millard, set forth in the preceeding statement of the case.

would construct a power plant on the Snake River, that he, Insull, would purchase the output at a price less than Insull's cost of production, which was not right. This he, however, endeavored unsuccessfully to do. In this attempt he borrowed of Insull between the years 1915 and 1918 $127,000, payments of which was evidenced by Millard's notes. He failed, however, to pay either principal or interest. These notes were secured by stock of the Illinois Light & Power Company. Later they became acquired a second lien on the stock pledged to Insull. The filed a bill to redeem, to which bill complainants were parties. A decree was obtained by him in that suit ordering her lien to the extent of $30,000, and directing a sale of the shares. Millard promised Arthur to discharge Vera's and Insull's liens. This he failed to do, whereupon the shares were offered for sale by a master, and Vera bought them. Millard d. Powers was at that time indebted to Insull in the sum of $180,000. This he likewise failed to pay. Arthur was jointly liable with him rather to pay the debt to Insull. In 1922 Arthur had negotiations with Insull with a view to paying this debt. Thereupon Millard filed a bill to redeem. He made no tender of payment of the debt admitted to be due. At this juncture Arthur sought to make a contract with Insull for an interest in the stock. This Insull would not do until Millard's bill was out of the way. Insull refused Arthur's importunities to dismiss his bill to redeem, or to give a release to Insull unless Arthur produced to Insull $180,000. Arthur thereupon paid Millard $30,112, which he obtained from Insull. Arthur's payment to Millard constituted Arthur's orendiaous had his adjudicated a bankrupt. The filing of the bill in this case was the final act of Millard. The filing, however, was subsequent to the giving of the release by Millard the [illegible] set forth in the preceding statement of the case.

It is an elementary legal principal that a demurrer admits only facts which are well pleaded, and those that are not so pleaded are not admitted. Neither does a demurrer admit legal conclusions asserted, but not sustained by facts alleged, nor assertions of ultimate facts which are not reinforced in the same manner. Also a demurrer does not admit charges of fraud which are general and not specific and charges of fraud alleged on information and belief are likewise not admitted by a demurrer. What is admitted, however, is confined to the state of mind of the alleging parties' belief and that only .

From complainants' pleading it first appears that on January 2, 1905 Millard R. Powers and Arthur N. Powers, under the firm name of Arthur N. Powers & Co., entered upon an enterprise to build and operate hydro electric power plants in Kankakee and Will Counties, Illinois, on the Kankakee River, and that thereafter in September, 1908 they were joined in such enterprise by Wilbur F. Powers, who was a civil engineer; that complainants between 1905 and 1909 at great expense acquired equipment, maps, plats, profiles and engineering data, including in 1909 a complete topographical survey of a portion of said Kankakee River, also written options of purchase for valuable considerations paid and to be paid upon certain lands on the Kankakee River, and upon a water plant, a gas plant and an electric light plant, said water plant, gas plant and electric light plant entailing, had the options been exercised, an expense of $600,000. As fraud is charged against the defendant Samuel Insull, in an effort by him to acquire interests in and supplant Millard R. and Arthur N. Powers in their enterprises on the Kankakee River, it may be noted that for the first time Insull's attention was called between January 2, 1906, and January 2, 1909, by Millard R.

It is an elementary legal principal that a demurrer admits only facts which are well pleaded, and those that are not so pleaded are not admitted. Neither does a demurrer limit legal conclusions asserted, but not sustained by facts alleged, nor assertions of ultimate facts which are not indicatored in the case manner. Also a demurrer does not admit charges of fraud which are general and not specific and charges of fraud alleged on information and belief are likewise not admitted by a demurrer. That is admitted, however, is confined to the state of mind of the alleging parties' belief and that only.

From complainants' pleading it first appears that on January 2, 1902 Milford R. Lowere and Arthur H. Lowere, under the firm name of Arthur H. Lowere & Co., entered upon an enterprise to build and operate hydro electric power plants in Kankakee and Ill Counties, Illinois, on the Kankakee river, and that thereafter in September, 1902 they were joined in such enterprise by Albert F. Lowere, who was a civil engineer; that consecutively between 1902 and 1909 at great expense acquired equipment, water, rights, position and engineering data, including in 1903 a complete topographical survey of a portion of said Kankakee river, also written opinions of counsel for valuable considerations said and to be said upon certain lands on the Kankakee river, and upon a water right, a gas plant and an electric light plant, said water rights, gas plant and electric light plant omitting, but the options been operative, in expense of 1001,000. As found in opinion against the defendant Samuel Insull, in an effort by him to acquire interests in and support Milford R. and Arthur H. Lowere in their enterprises on the Kankakee river, it may be stated that for the first time Insull's attention was called between January 2, 1906, and January 2, 1909, by Milford R.

Powers and Arthur N. Powers to their Kankakee River enterprises; and that they advised Insull of their field of operation, and that Insull stated that he was not and would not be interested in any hydro electric plants or interurban railroads outside of Chicago. It therefore clearly appears that complainants sought Insull, and not Insull the complainants, in their Kankakee River venture. It was a case where the Powers were endeavoring to interest Insull in their Kankakee River scheme, not a case where Insull was endeavoring to intermeddle with their affairs.

From the preceding statement of the case, appears, what is contended to be, the initial contract in the Kankakee River project, colloquially referred to as the contract of 1911. From what is set out regarding the same there cannot be extracted the elements of a binding contract in which the minds of the parties met upon any definite project. It is contended that the contract was oral. If it was, it is obnoxious to the Statute of Frauds, as it was not to be performed within the time which the law allows for the performance of such contracts. Moreover it is indefinite in its provisions. Furthermore, whatever it was, complainants in 1920 assigned all of their rights therein to Arthur N. Powers. Subsequently they assigned to the Powers Co. all right and claim to everything connected with it or the hydro electric development, and these they do not seek to set aside. It is also claimed that other oral contracts were made covering a period of years thereafter, none of which added in any manner vitality to the so-called contract of 1911.

The so-called contract of 1911 was not made with complainants, but with a partnership. This so-called contract is void for want of mutuality, as well as for uncertainty. Moreover it ran as to some matters, viz., the purchase and sale of electric

Powers and Arthur A. Powers to their Tombigbee River contracts; and that they advised Israel, of their kind of contracts, and that Israel advised that he was not sure he would not be interested in any hydro electric claims or interurban railroad rights of Chicago. It therefore clearly appears that Powers and Arthur thought Israel, and not Israel the contractor, in their discussions over Tombigbee. It was a case where Powers were endeavoring to interest Israel in their Tombigbee River contract, yet a case where Israel was concerning himself with their rights.

From the preceding statement of the case, it appears that is contended to be, the Israel contract in the Tombigbee River project, collaterally referred to in the contract of Israel. From what is set out regarding the case this case cannot be considered the elements of a binding contract in which the rights of the parties not much may depending project. It is considered that the contract was void. If it was, it is conclusive to the rights of Fraude, as it was not to be enforced within the time which the law allows for the enforcement of such contracts. However it is indefinite in its provisions. Further, whatever it was, complainants in 1920 assigned all of their rights therein to Arthur A. Powers. Subsequently they assigned to the Powers Co. all right and claim to everything connected with it or the Tombigbee electric development, and there they to not seek to set aside. It is also claimed that other oral contracts were made covering a period of years thereafter, none of which appear in any manner relativity to the so-called contract of 1911.

The so-called contract of 1911 was not made with complainants, but with a partnership. This so-called contract is void for want of mutuality, as said as for consideration. However it can as to some matters, viz., the purchase and sale of electric

current, for a period of fifty years and was consequently obnoxious to the statute of frauds. No breach thereof is alleged as against the defendant Insull. Laches is imputable to complainants for failure to assert a right thereunder within the statutory period. (Foss v. Peoples Gas Light & Coke Co., 293 Ill. 94, affirming the decision of this court in the same case.) The defense of the Statute of Limitations is available on demurrer. The claimed new promise did not remove the bar of the statute, as the doctrine of new promise has no application to actions of tort which the conspiracy charged in the bill is tantamount to. Nelson v. Petterson, 229 Ill. 240. The so-called new promise is of the same character as its forerunner, and is inoperative for the same reasons. The 1911 so-called contract is futile as a foundation of any liability, if for no other reason than that complainants were not parties to it and for that reason have no legal status empowering them to enforce it. The alleged conspiracy of 1921 presents no triable issue for the reason that all the averments regarding such conspiracy are alleged to rest upon information and belief. A demurrer does not admit facts so pleaded. Murphy v. Murphy, 189 Ill. 360; Grabarski v. Stankowicz, 179 Ill. App. 45, Chilvers v. Huenemoerder, 25o ibid. 499.

Much more might be said in this opinion in review of more of the multitudinous matters set forth in complainants' pleading, but we refrain, because, aside from every other consideration of either fact or law, the releases found in the record are a complete bar to any cause of action which complainants claim against the defendants Insull and Arthur M. Powers. The fact of these releases is not only not denied, but admitted and attempted to be turned for other uses in the prayer for relief,

current, for a period of fifty years and was consequently obnoxious to the statute of frauds. In order that it alleged as against the defendant Insull. Lorbis is impossible to complainants for failure to assert a right hereunder within the statutory period. (Ives v. Chicago Gas Light & Coke Co., 111. 24, affirming the decision of this court in the same case.) The defense of the statute of limitations is available on demurrer. The claimed new promise did not remove the bar of the statute, as the doctrine of new promise has no application to actions of debt which the conspiracy charged in the bill is tantamount to. Keigan v. Hutchison, 324 Ill. 294. The so-called new promise is of the same character as the forbearance, and is inoperative for the same reason. The 1921 so-called contract is futile as a foundation of any liability, if for no other reason than that complainants were not parties to it and for that reason have no legal rights empowering them to enforce it. The alleged conspiracy of [illegible] presents no tenable issue for the reason that all the statutes regarding such conspiracy are alleged to rest upon information and belief. [illegible] does not admit facts so pleaded. Lumley v. Gurney, 143 Ill. 361; Gaskarth v. Blackmarr, 172 Ill. App. 4a. Chicago v. Hackemeyer, 236 Ill. 434.

Much more might be said in this opinion in regard to the merits of the multitudinous matters set forth in complainants' pleading, but we refrain, because, aside from every other non-sufficiency of either fact or law, the matters found in the record are a complete bar to any cause of action which complainants claim against the defendants Insull and Insull, Jr., jointly. The fact of these releases is not only not denied, but admitted and accepted to be binding for other moneys in the proper for relief.

to which we will hereafter advert.

There is no reason assigned for setting aside the releases, without restoring the status quo ante. Complainants have made no case warranting the disturbance of the releases. There has been no return of the consideration paid for the releases. No fraud is charged in the procuring of the releases. There is no denial that the releases are good as to the defendant Insull, and as Arthur N. Powers and Samuel Insull are charged with being joint tort feasors, under elementary principles of law, the release of one joint tort feasor operates to release all. Lacking a return of the consideration paid for the releases operates as a confirmation and ratification of such releases.

The releases of Millard R. Powers and Wilbur F. Powers are sweeping releases embracing every thing from the beginning of time until the date of their delivery. It is hard to understand how they could be more complete or conclusive of the final settlement and adjustment of the rights of all the parties involved in the litigation. The complainants for ample and sufficient considerations released and forever discharged, the defendants Insull and Arthur N. Powers, both individually and as a member of the firm of Arthur N. Powers & Co., and acknowledged full payment and satisfaction of all claims, rights and demands of any kind and nature, individually or as an alleged member of said firm, which they "now have or ever have had against said firm and release and forever discharge Arthur N. Powers & Co., Arthur N. Powers, Samuel Insull, Public Service Company of Northern Illinois, Illinois Light & Power Co. and all or any of them of and from any and all manner of actions, cause or causes of action, debts, dues, sums of money, accounts, reckonings, bonds, bills, wages, salaries, notes, specialities, covenants, contracts, controversies, agreements, promises,

to which we will hereafter advert.

There is no reason assigned for setting aside the releases, without restoring the <u>status quo ante</u>. Complainants have made no case warranting the disturbance of the releases. There has been no return of the consideration paid for the releases. No fraud is charged in the procuring of the releases. There is no denial that the releases are good as to the defendant Insull, and as Arthur R. Powers and Samuel Insull are charged with being joint tort feasors, under elementary principles of law, the release of one joint tort feasor operates to release all. Leaving a return of the consideration paid for the releases operates as a confirmation and ratification of such releases.

The balances of William R. Powers and Arthur R. Powers are excepting balances accruing every three from the beginning of time until the date of their activity. It is hard to understand how they could be more complete or comprehensive of the final settlement and adjustment of the rights of all the parties involved in the litigation. The court [illegible] for [illegible] and [illegible] alternations relieved and forever discharged. [illegible] Insull and Arthur R. Powers, with [illegible] a release of the [illegible] of Arthur R. Powers [illegible] and [illegible] of all liens, [illegible] and [illegible], individually or as [illegible] which they "now have or ever [illegible] [illegible] releases and forever discharge [illegible] Powers, Samuel Insull, [illegible] of [illegible] liability, [illegible] lightning rights [illegible] and all manner of actions, cause of [illegible] of action, [illegible] dues, sums of money, accounts, reckonings, [illegible], judgments, [illegible], notes, [illegible] liens, covenants, [illegible] contracts, agreements, [illegible]

variances, trespasses, damages, judgments, executions, claims and demands, whatsoever in law or in equity, which they now may have or ever have had against the said Arthur N. Powers & Co., Arthur N. Powers, Samuel Insull, Public Service Company, Illinois Light & Power Co., and acknowledge full payment for all interest which they then had or ever had in and to any of the shares of capital stock and bonds of said Illinois Light & Power Co, or in the hydro electric power development, upon, adjacent to or bordering upon any portion of the Kankakee River, for such consideration and value received, both individually and as an alleged member of said firm, hereby sell, assign and transfer to said Illinois Light & Power Co. any right, title and interest in and to all maps, plats, profiles, plans, drawings, surveys, records, survey books, reports, appraisals, abstracts of title, deeds, documents, blue prints, drilling records and any and all other papers, data, cause or thing of whatsoever kind and nature which they then had or ever had, for, upon or by reason of any such matters, cause or thing whatsoever, and in and to or relating to said Illinois Light & Power Co., and in and to its stock and bonds and in and to said hydro electric power development, from the beginning of the world to the day of these presents, and hereby make delivery of all such papers, plats, maps, survey records, survey books, etc. as herein recited" to Arthur N. Powers for the account of said Illinois Light & Power Co. as its interests may appear. There is no charge by complainants of any fraud or untruthful representations made to them to induce them to execute and deliver these releases. They were intimately informed of the whole situation and were presumed to know the legal effect of their execution of such releases. Moreover the complainant, Millard R. Powers, was a lawyer of long standing at the bar of Illinois, so that aside from the

variances, stipulations, changes, judgments, executions, claims and demands, whatsoever in law or in equity, which they nor any have or ever have had against the said arthur v. powers & co., arthur j. powers, manuel insull, public service company, illinois light & power co., and relinquish full payment for all interest which they then had or ever had in and to any of the shares of capital stock and bonds of ozaukee illinois light & power co, or in the hydro electric power development, mean, adjacent to or bordering upon any portion of the ozaukee river, for such consideration and value received, both individually and as an alleged member of said firm, hereby sell, assign and transfer to said illinois light & power co. any right, title and interest in and to all mens, maps, profiles, plans, drawings, surveys, records, survey books, reports, computations, estimates of time, deeds, abstracts, plat plots, drilling records and any and all other papers, data, books or thing of whatsoever kind and nature which they then had or ever had, for, upon or by reason of any such matters, issue or thing whatsoever, and in and to or relative to said illinois light & power co., and in and to its stock and bonds and in and to said hydro electric power development, from the beginning of the world to the day of these presents, and hereby make delivery of all such mens, data, maps, survey records, survey books, and papers to said illinois light & power co. as herein recited to either, hereby for its account to and illinois light & power co. as its interests may appear. There is no other or complicate of any fraud or unlawful arrangements or do so than to induce them to execute and deliver these releases. They are intimately informed of the state situation and understand to know the legal effect of their execution. I have relations, moreover the complainant, mirane c. powers, was a lawyer of long standing at the bar of illinois, so that aside from the

presumption of law that he knew the legal effect of his act in executing and delivering such release, from his learning as an old practitioner at the bar, he had actual knowledge of the legal effect of his act in executing and delivering such release, and whatever the actual fact may have been, keeping the consideration paid for the release and converting the same rightfully to his own use, and an utter failure to restore the status quo ante, are effectual bars to disturb in any manner the releases or to change the situation created by their execution and delivery. Moreover no attempt is made to set these releases aside, although a futile attempt is made to have this court treat them as contracts between the parties in matters alien to their provisions and their purport and legal effect. By the averments of the amended bill complainants have in legal purport and effect ratified and confirmed these two releases in accord with their provisions and legal interpretation of the language in them used to evidence contracts of release. The power of the court does not extend to make contracts for parties,but is limited to construing and interpreting them from the language used by the parties in evidencing the same. The right of parties to be free and untrammeled in the making of lawful contracts is established by the law of the state and nation. As well said in Clark v. Muir, 398 Ill. 548: "A court of equity cannot substitute a different contract for the one the parties made." It was likewise said in Stone v. Palmer, 166 ibid. 463: "There is no rule in equity that will enable a court to substitute a contract of its own making for that of the parties". It is furthermore patent from complainants' pleading that there is no statement of fact found therein upon which the court would be warranted in making such a radical change in the releases, which their counsel urge in argument.

presumption of law that be sure the legal effect of his act in executing and delivering such release, from his knowing as an old practitioner at the bar, he had actual knowledge of the legal effect of his act in executing and delivering such release, and whatever the actual fact may have been, keeping the consideration paid for the release and conveying the same rightfully to his own use, and an after failure to restore the <u>ritting one dime</u>, are efectual here to disturb in any manner the release or to change the situation created by their execution and delivery. Moreover no attempt is made to set the release aside, although a little attempt is made to have this court treat them as contracts between the parties in matters alien to their provisions and their purport and legal effect. By the statute of the amended bill complainants have in legal amount and effect ratified and confirmed those two deeds in evidence. With their provisions and legal interpretation of the language in them used to evidence controlling in relation. [illegible] of the court does not extend to make contracts for parties, but is limited to construing and interpreting them from the language used by the parties in evidencing the same. The right to contracts to be free and untrammeled in the making of legal contracts is established by the [illegible] of the state and nation. [illegible] in <u>Clark v. Duke</u>, 35 Ind. [illegible] the court of equity cannot substitute a different contract for the one the parties made. It was likewise said in <u>Hogue v. Ashby</u>, 100 Ind. 400: "There is no rule in equity that will permit [illegible] to substitute a contract of its own making for that of the parties." It is furthermore patent from complainants' amending that there is no statement of fact found therein upon which the court could be warranted in making such a radical change in the contracts, which their counsel urge in argument.

Aside from every other question of either fact or law appearing in the averments of complainants' amended bill, the two releases executed and delivered by complainants are a complete bar to any cause of action against any or either of the defendants in the cause. The complainants have settled their former differences for a sufficient lawful consideration to them paid and received, and which settlement is evidenced by complainants' two releases found in the record. Such releases were binding upon them at the time and they are now invulnerable to attack in equity.

We have made but sparse reference to the wealth of authority cited in the briefs, because, as we view the crucial questions in the case, there is no serious conflict in the authorities or the decisions of the courts supporting the conclusions announced in this opinion.

We are in full accord with the decision of the chancellor that the amended bill does not state a case entitling complainants to any relief against any of the defendants in a court of equity. Therefore the decree of the Superior Court dismissing the amended bill for want of equity is affirmed.

DECREE AFFIRMED.

WILSON, P.J. AND RYNER, J. CONCUR.

Aside from every other question of either law or fact appearing in the averments of complainants' amended bill, the two releases executed and delivered by complainants are a complete bar to any cause of action against any or either of the defendants in the cause. The complainants have settled their former differences for a sufficient lawful consideration to them paid and received, and which settlement is evidenced by complainants' two releases found in the record. Such releases were binding upon them at the time and they are now irrevocable to attack in equity.

We have made but sparse reference to the wealth of authority cited in the briefs, because, as we view the great questions in this case, there is no serious conflict in the authorities or the decisions of the courts interpreting the conclusions announced in this opinion.

We are in full accord with the decision of the chancellor that the amended bill does not state a cause entitling complainants to any relief against any of the defendants in a court of equity. Therefore the decree of the chancellor dismissing the amended bill for want of equity is affirmed.

Decree affirmed.

Filed, J.J. Mc Alpin, A. [illegible]

33422

WILLIAM KOTSAKIS,
Appellee,

vs.

PETER ORPHAN, Doing Business as Chicago Packing House,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 627

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trover to recover the value of certain restaurant equipment and upon trial had a verdict for $2,000. From the judgment thereon defendant appeals.

A phase of this controversy was before this court in an opinion filed April 13, 1925, (237 Ill. App. 634.) We there affirmed the judgment, finding the right of property in the plaintiff. The property was not returned, and this suit was brought. As stated by the attorney for the defendant, the only question here involved is the market value of the equipment at the time it was taken.

Six witnesses testified, four for plaintiff and two for defendant. There was a variation in the opinions, from $250 testified to on behalf of the defendant, to $4500, the value given by one of the witnesses for plaintiff. The jury, having the opportunity to see the witnesses and judge of their intelligence and credibility and having considered the variant opinions, could properly fix the value at $2,000.

The defendant suggests that, because the attorney for the plaintiff in the former trial swore in the affidavit for replevin that the value of the goods was $200, plaintiff is bound thereby in the present action and cannot recover more. This is not the rule. In Martin v. Hertz, 224 Ill. 84, it was held that the value of the property stated in the replevin writ and bond is

WILLIAM ROTHANZL,
Appellee,

vs.

FRANK GRIMAN, doing business
as Chicago Feeding Company,
Appellant.

APPEAL FROM THE MUNICIPAL COURT
OF CHICAGO.

53422

MR. PRESIDING JUSTICE MCGOORTY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in trover to recover the value of certain restaurant equipment and upon trial had a verdict for $2,000. From the judgment thereon defendant appeals.

A phase of this controversy was before this court in an opinion filed April 14, 1939, (283 Ill. App. 234.) by which affirmed the judgment, holding the right of property in was plaintiff. The property was not replevied, and this suit was brought. As stated by the attorney for the defendant, the only question here involved is the proper value of the property at the time it was taken.

The evidence is sufficient, in our judgment, and two for defendant. There was a variation in the opinions, from $2 testified to on behalf of the defendant, to $4,000, the value given by one of the witnesses for plaintiff. The jury, having the opportunity to see the witnesses and judge of their demeanor and credibility and hearing their testimony, could properly fix the value at $1,000.

The defendant suggests that, because the attorney for the plaintiff in the former trial made a statement for the plaintiff that the value of the goods was $2,000, the action is barred thereby in the present action and cannot recover more. This is not the rule. In Martin v. Kirk, 321 Ill. 44, it was held that the value of the property stated in the replevin writ and bond is

only prima facie evidence of value and will prevail only where there is no evidence to the contrary. In Peters for Use of Keenon vs. Brown, 245 Ill. App. 570, it was held that the value given in the replevin bond and affidavit is not conclusive and that the actual facts as to values should be permitted to be shown.

The finding of the jury was well within the scope of the testimony and as there was no reversible error upon the trial the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

only prima facie evidence of value and will prevail only where there is no evidence to the contrary. In Estate for Use of Keenon vs. Brown, 245 Ill. App. 370, it was held that the value given in the replevin bond and affidavit is not conclusive and that the actual facts as to values should be permitted to be shown.

The finding of the jury was well within the scope of the testimony and as there was no reversible error upon the trial the judgment is affirmed.

AFFIRMED.

Hatchett and O'Connor, JJ., concur.

33508

ERNEST RECKER,
Plaintiff in Error,

vs.

JULIUS SWANSON,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

255 I.A. 627

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $587.35 claimed to be a balance due from defendant for a tax payment under the terms of a real estate contract. Upon trial by the court the issues were found for the defendant. Plaintiff asks that the adverse judgment be reversed.

The real estate contract provided for the exchange of real estate between the parties, but we shall notice only the facts with reference to the property conveyed to the plaintiff. There is no controversy as to the property conveyed to the defendant.

The contract was dated August 31, 1925, and provided that the taxes for the year 1925 should be pro-rated from January 1, 1925, to the date of the delivery of the deed, and if the taxes could not be paid at the time the deal was closed they should be paid on or before the 1st day of May of the following year.

John E. Benz was the agent for plaintiff, and the defendant was represented by William L. Wallen & Sons. October 23, 1925, plaintiff, Benz (his agent) and William Wallen, Jr., (agent for the defendant) met in conference at the office of Wallen & Sons to close the deal. It is not clear as to whether the defendant was present at this time. The evidence tends to show that Benz asked Wallen, Jr., to produce the tax bill for 1925 in order to pro-rate the amount. Wallen, Jr., could not do so,

33508

KENNET ROCKER, Plaintiff in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
JULIUS BRANDON, Defendant in Error.	

MR. PRESIDING JUSTICE MORGANLY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover $367.35 claimed to be a balance due from defendant for a tax payment under the terms of a real estate contract. Upon trial by the court the issues were found for the defendant. Plaintiff asks that the adverse judgment be reversed.

The real estate contract provided for the exchange of real estate between the parties, but we shall notice only the facts with reference to the property conveyed to the plaintiff. There is no controversy as to the property conveyed to the defendant.

The contract was dated August 21, 1925, and provided that the taxes for the year 1925 should be pro-rated from January 1, 1925, to the date of the delivery of the deed, and if the taxes could not be paid at the time the deal was closed they should be paid on or before the 1st day of May of the following year.

John E. Dunn was the agent for plaintiff, and the defendant was represented by William L. Wallen & Sons. October 23, 1925, plaintiff, Dunn (his agent) and William Wallen, Jr., (agent for the defendant) met in conference at the office of Wallen & Sons to close the deal. It is not clear as to whether the defendant was present at this time. The evidence tends to show that Dunn asked Wallen, Jr., to produce the tax bill for 1925

presumably because the tax bill for 1925 would not be issued until the early part of the following year. Wallen, however, produced the tax bill for the year 1924 and plaintiff's testimony is that it was agreed that this bill should be the basis of a temporary adjustment, the final adjustment to be made upon receipt of the 1925 tax bill; that Wallen, Jr., stated that his client would pay any difference if the 1925 taxes should be larger, and, on the other hand, plaintiff should refund to defendant if they proved to be less than they were in 1924. Plaintiff requested a letter embodying this agreement, but Wallen, Jr., said his parties were reliable and would stand by the agreement. The taxes for 1924 were $1136.38. Upon the advice of Benz plaintiff acquiesced and the deed was delivered and the deal closed, defendant paying plaintiff $925.07 as his share of the taxes of 1925 based upon the taxes for 1924. There was other evidence tending to prove that this was the agreement.

Plaintiff entered into possession of the property, and when the tax bill for 1925 was subsequently procured it was for $1858.38 - much larger than for 1924. This would make the prorated share of defendant $1512.42, on which he had already paid $925.07, leaving $587.35 due from him.

It was also in evidence that these facts were called to the attention of Wallen & Sons by letters; the first dated May 6, 1926, in which plaintiff demanded the payment of this difference; also a letter dated October 7, 1926, in which plaintiff's claim was again stated with a request for the payment of the balance due. A third letter was sent embodying the same demand on October 14, 1926. No replies were made to these letters.

Upon the trial William Wallen, Jr., did not testify, as he was in Florida. It was in evidence that when the deed was issued Wallen & Sons marked the contract cancelled, and it seems to have been the opinion of the trial Judge that this indicated a complete

presumably because the tax bill for 1925 would not be issued until the early part of the following year. Wallen, however, produced the tax bill for the year 1924 and plaintiff's testimony is that it was agreed that this bill should be the basis of a temporary adjustment, the final adjustment to be made upon receipt of the 1925 tax bill; that Wallen, Jr., stated that his client would pay any difference if the 1925 taxes should be larger; and, on the other hand, plaintiff should refund to defendants if they proved to be less than they were in 1924. Plaintiff requested a letter embodying this agreement, but Wallen, Jr., said his parties were reliable and would stand by the agreement. The taxes for 1924 were $1156.38. Upon the advice of Dunn plaintiff acquiesced and the deed was delivered and the deal closed, defendant paying plaintiff $928.07 as his share of the taxes of 1925 based upon the taxes for 1924. There was other evidence tending to prove that this was the agreement.

Plaintiff entered into possession of the property, and when the tax bill for 1925 was subsequently received it was for $1208.38 - much larger than for 1924. This sum, with the accrued share of defendant $1124.42, on which he had already paid $925.07, leaving $287.35 due from him.

It was plain to avoid our cases lest were called to the attention of Wallen & Dunn by letters; the first dated July 6, 1926, in which plaintiff demanded the payment of this difference, also a letter dated October 7, 1926, in which plaintiff's claim was again stated with a request for the payment of the balance due. A third letter was sent embodying the same demand on October 21, 1926. No replies were made to these letters.

Upon the trial William Wallen, Jr., did not testify, as he was in Florida. It was in evidence that Mr. Dunn was issued Wallen & Dunn earned the contract exclusively, but it seems to have been the opinion of the trial Judge that this indicated a condition

termination of any obligations or undertakings between the parties. In so holding the court was in error. Ordinarily, the execution of a deed in pursuance of a contract of sale extinguishes the contract, but this is not so where the contract provides for the performance of acts other than the conveyance. Biewer v. Mueller, 254 Ill. 315; Gillett v. Teel, 272 Ill. 106.

The decision of this case turns upon a question of fact, namely, whether the parties agreed to settle the pro-rating of the taxes upon the basis of the 1924 taxes, or whether such taxes were merely a temporary basis of settlement, the matter to be finally adjusted when the actual amount of the 1925 taxes should be ascertained. The trial court did not allow the trial to be completed, but announced his decision for the defendant before the evidence was all heard.

We hold that the case should be re-tried; that all the parties should be given an opportunity of presenting their respective versions of what was said at the conference at the time of the passing of the deed. The testimony of William Wallen, Jr., should, if possible, be procured. If the greater weight of the evidence tends to support plaintiff's version, he is entitled to judgment; otherwise, not.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

termination of any obligation or undertaking between the parties. In so holding the court was in error. Ordinarily, the execution of a deed in pursuance of a contract of sale extinguishes the contract, but this is not so where the contract provides for the performance of acts other than the conveyance. Glover v. Mueller, 224 III. 310; Gillett v. Yost, 272 III. 164.

The decision of this case turns upon a question of fact, namely, whether the parties agreed to settle the cross-claims of the taxes upon the basis of the 1923 taxes, or whether such taxes were merely a temporary basis of settlement, to be subject to finally adjusted when the actual amount of the 1923 taxes should be ascertained. The trial court did not allow the trial to be completed, but announced his decision for the defendant before the evidence was all heard.

We hold that the case should be re-tried; that all the parties should be given an opportunity of presenting their respective versions of what was said at the conference at the time of the passing of the deed. The testimony of William Walton, Jr., should, if possible, be procured. If, the greater weight of the evidence tends to support plaintiff's version, he is entitled to judgment; otherwise, not.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

Barnett and O'Connor, JJ., concur.

33813

ETHEL D. KEWLEY,
Defendant in Error,

vs.

IRVING KNAPP and IRVING KNAPP,
Doing Business as I. KNAPP & CO.,
Plaintiff in Error,

ERROR TO MUNICIPAL COURT
OF CHICAGO.

255 I.A. 627

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of an adverse judgment for $450 upon the verdict of a jury. Plaintiff brought suit to recover the value of a fur cape which she had delivered to defendant for repairs and which was lost.

Plaintiff originally commenced her action against the Knapp Fur Company, Inc. Subsequently Irving Knapp was made an additional party defendant. In his affidavit of defense Knapp admitted the receipt of the fur cape but pleaded the statute of limitations. Upon trial the Knapp Fur Company, Inc., was dismissed, and the court instructed the jury that, as a matter of law, Irving Knapp could not claim the benefit of the statute of limitations, even though he had first been made a party to this suit more than five years after the loss of the fur cape.

Under the circumstances, could Knapp successfully invoke the statute of limitations as a defense? We hold that he could not.

May 8, 1922, plaintiff delivered her cape to Irving Knapp, doing business as I. Knapp & Company. Two or three days thereafter Knapp informed her that the cape was lost. May 19, 1922, defendant's business was incorporated under the name of Knapp Fur Company, Inc., Irving Knapp, president. August 21, 1925, suit was commenced against the corporation and summons was served on Irving

33013

ETHEL D. KEMLEY,
Defendant in Error,

vs.

IRVING KNAPP and IRVING KNAPP,
Doing business as I. KNAPP & CO.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

25 I.A. 627

MR. MESSRS JUSTICE MORGAN

DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the reversal of an adverse judgment for $450 upon the verdict of a jury. Plaintiff brought suit to recover the value of a fur cape which she had delivered to defendant for repairs and which was lost.

Plaintiff originally commenced her action against the Knapp Fur Company, Inc. Subsequently Irving Knapp was made an additional party defendant. In his affidavit of defense Knapp admitted the receipt of the fur cape but pleaded the statute of limitations. Upon trial the Knapp Fur Company, Inc., was dismissed, and the court instructed the jury that, as a matter of law, Irving Knapp could not claim the benefit of the statute of limitations, even though he had first been made a party to this suit more than five years after the loss of the fur cape.

Under the circumstances, could Knapp successfully invoke the statute of limitations as a defense? We hold that he could not.

May 8, 1922, plaintiff delivered her cape to Irving Knapp, doing business as I. Knapp & Company. Two or three days thereafter Knapp informed her that the cape was lost. May 19, 1922, defendant's business was incorporated under the name of Knapp Fur Company, Inc., Irving Knapp, president. August 21, 1923, suit was commenced against the corporation and summons was served on Irving

Knapp. The defendant corporation was defaulted, the case proceeded to trial and plaintiff recovered a judgment for $700. September 3, 1925, defendant corporation moved that this be vacated and set aside, which was done, and it was given leave to file an affidavit of defense. September 14, 1925, defendant corporation filed its affidavit, sworn to by Irving Knapp, admitting that the defendant corporation received plaintiff's fur cape, and demanded a jury trial; when the case was reached on March 25, 1927, it was not present. After hearing evidence the jury returned a verdict of $550, on which judgment was entered. On April 6, 1927, defendant corporation moved the court to vacate this judgment, which was allowed. The case again came on regularly for trial on January 20, 1928, when defendant corporation filed an amended affidavit of defense signed by Irving Knapp, in which, for the first time, it was denied that defendant corporation had received the fur cape on May 8, 1922, and asserted that the corporation was not in existence at that date. Plaintiff thereupon, by leave of court, filed her amended statement of claim on February 11, 1928, making Irving Knapp doing business as I. Knapp & Company an additional party defendant. He was served with summons and filed his affidavit of defense, in which he admitted that he received the fur cape as aforesaid, but pleaded that five years had elapsed since the cause had accrued and hence he could not be held liable.

The mere running of the statutory time is not always a complete defense. Certain exceptions may exist; for instance, Section 22, Chapter 38, Limitations, provides that, if a person liable to an action fraudulently conceals the cause of action, it may be commenced at any time within five years after the person entitled to bring the same discovers that he has such action.

It has been the accepted practice that, where the

Knapp. The defendant corporation was defaulted, the case proceeded to trial and plaintiff recovered a judgment for $7[illegible]. September 2, 1922, defendant corporation moved that this be vacated and set aside, which was done, and it was given leave to file an affidavit of defense. September 14, 1922, defendant corporation filed its affidavit, sworn to by Irving Knapp, admitting that the defendant corporation received plaintiff's for cape, and demanded a jury trial; when the case was reached on March 25, 1927, it was not present. After hearing evidence the jury returned a verdict of $[illegible], on which judgment was entered. On April 6, 1927, defendant corporation moved the court to vacate this judgment, which was altered. The case again came on regularly for trial on January 24, 1928, when defendant corporation filed an amended affidavit of defense signed by Irving Knapp. It said, for the first time, it was alleged that defendant corporation had received the fur cape on May 4, 1922, and asserted that the corporation was not in existence at that date. Plaintiff thereupon, by leave of court, filed her amended statement of claim on February 14, 1927, making Irving Knapp [illegible] I. Knapp & Company an additional party defendant. He was served with summons and filed his affidavit of defense. It appears and has that he received the fur cape as alleged, but pleaded that [illegible] years had elapsed since the cause had accrued and hence he could not be held liable.

The more reading of the [illegible] complaint defense. Certain exceptions may exist; [illegible] Section 24, number 3, [illegible], provides that, if a person liable to an action ([illegible]) conceals [illegible] may be commenced at any time within [illegible] entitled to bring the same discovers [illegible].

It has been the general practice [illegible]

identity of the defendant is the same, although there may be a misnomer as to the name under which he is doing business, advantage of such misnomer must be taken by a plea in abatement. In Pennsylvania Co. v. Bloom, 125 Ill. 72, it was held that, because of the failure of the defendant to file a plea in abatement, it was concluded by the judgment as if it were described by its true name. To the same effect is Pond v. Ennis, 69 Ill. 341. In Moore vs. The Wabash Railway Co., 219 Ill. App. 574, suit was brought against The Wabash Railroad Company, whose name was subsequently changed to The Wabash Railway Company. It was held that, since defendant filed no plea in abatement, it could not successfully claim the bar of the statute of limitations.

It would be unconscionable to permit the defendant to prolong this case by dilatory tactics for over five years and then for the first time to claim a misnomer of the defendant. Irving Knapp was served with summons. In none of his pleas of defense, whether on his own behalf or on behalf of the corporation as president, was the receipt of plaintiff's cape denied but was admittd.

We see no reason to disturb the judgment and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

identity of the defendant in the case, although there may be a misnomer as to the name under which he is doing business, advantage of such misnomer must be taken by a plea in abatement. In Pennsylvania Co. v. Sloan, 125 Ill. 73, it was held that, because of the failure of the defendant to file a plea in abatement, it was concluded by the judgment as if it were described by its true name. To the same effect is Pond v. Ennis, 69 Ill. 321. In Keefe vs. The Wabash Railway Co., 212 Ill. App. 574, suit was brought against The Wabash Railroad Company, whose name was subsequently changed to the Wabash Railway Company. It was held that, since defendant filed no plea in abatement, it could not successfully claim the bar of the statute of limitations.

It would be unconscionable to permit the defendant to prolong this case by dilatory tactics for over five years and then for the first time to claim a misnomer of the defendant. Irving Koepp was served with summons. In none of his pleas of defense, whether on his own behalf or on behalf of the corporation as president, was the receipt of plaintiff's copy denied but was admitted.

We see no reason to disturb the judgment and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

33577

HARRY KAPUST,
Appellee,

vs.

CARL EBER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 628

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment entered upon the finding of the court in favor of plaintiff and assessing his damages at $364.50 and finding against the defendant on his claim of set-off.

September 19, 1927, plaintiff, as lessee, signed a lease of a certain apartment in a building in process of construction at number 1953 Humboldt boulevard, Chicago, owned by defendant, the lessor. The lease was for one year commencing October 1, 1927, at a monthly rental in advance of $90. Plaintiff paid $90 on account of the October rent. In his statement of claim he says that the apartment was not in a "habitable condition and ready for occupancy on October 1, 1927;" that by reason thereof he was forced to move elsewhere. Plaintiff seeks the recovery of the $90 paid for the October rent and also damages claimed to have been sustained for warehouse and moving charges and for moneys paid for hotel board for himself and family, amounting altogether to $424.50.

Defendant's set-off claimed that there was no breach on his part of any of the covenants and conditions of the lease, yet plaintiff refused to take possession and it then became necessary for the defendant to re-rent the premises, which was not accomplished until November 15th with ensuing damages.

The decisive question is whether the apartment was habitable on October 1, 1927. There is conflicting testimony

33577

HARRY AUGUST,
Appellee,

vs.

CARL KEEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCGURNIT
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment entered upon the finding of the court in favor of plaintiff and assessing his damages at $384.50 and finding against the defendant on his claim of set-off.

September 18, 1927, plaintiff, as lessee, signed a lease of a certain apartment in a building in process of construction at number 1532 Sunnyside Boulevard, Chicago, owned by defendant, the lessor. The lease was for one year commencing October 1, 1927, at a monthly rental in advance of $[illegible]. Plaintiff paid $90 on account of the October rent. [illegible] says that the apartment was not in a habitable condition and ready for occupancy on October 1, 1927; that by reason thereof he was forced to move elsewhere. [illegible] seeks the recovery of the $90 paid for the October rent [illegible] as damages [illegible] been sustained for moving [illegible] and [illegible] paid for hotel board for himself and family, amounting altogether to $424.50.

Defendant's set-off alleges that [illegible] on his part of any of the covenants and conditions of the lease, yet plaintiff refused to take possession and [illegible] necessary for the defendant to remove the [illegible] which was not accomplished until November 12th with [illegible] damage.

The decisive question is whether the apartment was habitable on October 1, 1927. There is conflicting testimony

as to this, but the more believable evidence convinces that the work on the apartment was finished and that the only thing uncompleted on October 1st was a few hours work of painting in the front vestibule. The painting contractor, who tells a consistent story, testified that the flat was complete as to plumbing, radiators, walls, electric light fixtures, and that the only work to be done on October 1st was four or six hours work of painting in the front vestibule. His statement as to the condition of the apartment and building is confirmed by the testimony of other witnesses who had ample opportunity to know the facts.

The evidence shows that the wife of plaintiff started to move in on the evening of September 30th, but when she found there was a smell of fresh paint and varnish in the apartment and also some dirt on the floor left by the workmen she was dissatisfied and forthwith ordered the movers to take the furniture out of the apartment and place it in storage. Plaintiff testified that he took his family to a hotel and made no attempt whatever to rent another apartment for two months thereafter.

Under all the facts in evidence plaintiff was not entitled to recover anything from the defendant, and the finding in this respect was not justified.

To support his claim of set-off defendant testified that after he was informed that plaintiff would not take possession he replaced the rent sign in the apartment and endeavored to rent it; that it remained vacant until November 15th, when he rented it for $85 a month for the remainder of the term covered by plaintiff's lease. This would make a loss of $45 for half of November, and $55 on account of the smaller rental for the balance of the term, or a total loss of $100. We hold that defendant was entitled

as to this, but the more believable evidence convinces that the work on the apartment was finished and that the only thing unfinished on October 1st was a few hours work of painting in the front vestibule. The painting contractor, who testified in mitigation of the story, testified that the flat was complete as to flooring, radiators, walls, electric light fixtures, and that the only work to be done on October 1st was four or six hours work of painting in the front vestibule. His statement as to the condition of the apartment and building is confirmed by the testimony of other witnesses who had ample opportunity to know the facts.

The evidence shows that the wife of plaintiff started to move in on the evening of September 30th, and when she found there was a smell of fresh paint and varnish in the apartment and also some dirt on the floor left by the workmen she was dissatisfied and furthermore ordered the movers to take the furniture out of the apartment and place it in storage. Plaintiff's attitude that he took his family to a hotel and made no attempt to rent another apartment for two months thereafter.

Under all the facts in evidence plaintiff was not entitled to recover anything from the defendant, and the decision in this respect was not justified.

To support his claim of constructive delivery, that after he was informed that plaintiff would not [illegible] he rescinded the rent sign [illegible] it; that it remained vacant until November 15th, when he leased it for $65 a month for the remainder of the term [illegible] plaintiff's lease. This would make a loss of $[illegible] and $65 on account of the months rented for the balance of the term, or a total loss of $[illegible]. [illegible]

to judgment on his set-off for this amount and no more.

The judgment is therefore reversed and judgment will be entered in this court that plaintiff take nothing and that defendant recover $100 from plaintiff on his claim of set-off.

REVERSED AND JUDGMENT HERE.

Matchett and O'Connor, JJ., concur.

to judgment on his set-off for this amount and no more.

The judgment is therefore reversed and judgment will be entered in this court that plaintiff take nothing and that defendant recover $100 from plaintiff on his claim of set-off.

REVERSED AND JUDGMENT ENTER.

Metcalfe and O'Connor, JJ., concur.

33595

255 I.A. 628

JOHN A. BELSKEY,
Appellee,

vs.

ANN BELSKEY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order allowing her temporary alimony pendente lite of $20 a week. The reasonableness of the allowance is not questioned in defendant's brief, but we are asked to reverse because of alleged irregularities.

The order appealed from was entered by Judge William N. Gemmill of the Superior court, and it is asserted that this was a review of a prior order entered by Judge Walter P. Steffen of the same court allowing $25 a week for temporary alimony. We do not think defendant's point has merit.

The case appears to have been on the calendar of Judge Gemmill. On account of his illness Judge Steffen took charge of his call for a day and entered the prior order. When Judge Gemmill resumed his call the complainant presented the question of temporary alimony to him. The hearing then proceeded before Judge Gemmill not as reviewing any order entered by Judge Steffen, but rather as a continuation of the same matter. The hearing before Judge Gemmill consisted of informal argument, in which all the parties took part. Defendant orally asked that the case be sent to Judge Steffen, but as it was Judge Gemmill's case he could properly deny the motion and proceed with the hearing.

As the hearing drew to a close, and after the chancellor had indicated his opinion, a petition for change of venue was presented by the defendant. It was too late to file such a motion

38842

JOHN A. BOLANDEY,
Appellee,

vs.

ANN BOLANDEY,
Appellant.

APPEAL FROM APPELLATE COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MCBRIDE
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an order allowing her temporary alimony pendente lite of $25 a week. The reasonableness of the allowance is not questioned in defendant's brief, but we are asked to reverse because of alleged irregularities.

The order appealed from was entered by Judge William E. Connelly of the Superior Court, and it is asserted that this was a review of a prior order entered by Judge Walter C. Kelley of the same court allowing $15 a week for temporary alimony. We do not think defendant's point has merit.

The case appears to have been on the calendar of Judge Connelly. On account of his illness Judge Kelley took charge of his call for a day and entered the prior order. When Judge Connelly resumed his call the complainant presented the question of temporary alimony to him. The hearing then presented before Judge Connelly was not a reviewing any order entered by Judge Kelley, but rather as a continuation of the same matter. The matter by before Judge Connelly consisted of informal arguments, in which all the parties took part. Defendant orally asked that the case be sent to Judge Kelley, but as it was Judge Connelly's case he could properly deny the motion and proceed with the hearing.

As the hearing drew to a close, and after the chancellor had indicated his opinion, a petition for change of venue was presented by the defendant. It was too late.

after the hearing had commenced. As the petition was dated and sworn to the day before the hearing was had, it is evident that counsel withheld the same until he saw that the court was inclined to decide against him. Under such circumstances the motion was properly disallowed. Richards v. Greene, 78 Ill. 525; Ford v. Ford, 189 Ill. App. 468.

No sufficient reason is presented for a reversal and the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

after the hearing had commenced. As the petition was dated and sworn to the day before the hearing was had, it is evident that counsel withheld the same until he saw that the court was inclined to decide against him. Under such circumstances the motion was properly disallowed. Elmwood v. Wagner, 78 Ill. 380; Ford v. Ford, 1[illegible] Ill. App. 406.

No sufficient reason is presented for a reversal and the order is affirmed.

AFFIRMED.

Mathews and O'Connor, JJ., concur.

33598

ANTON SZYMCZYK and KONSTANCYA SZYMCZYK, His Wife,
Appellees,

vs.

JOSEPH ANDREW LASECKI,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 628

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, vendors in a contract to sell real estate, brought suit against the defendant who was the holder of the earnest money paid by the proposed purchasers, and upon trial by a jury had a verdict for $500. From the judgment thereon defendant appeals.

October 17, 1923, plaintiffs as vendors made a written contract with the proposed vendees, Roman Lobojko and Marya Lobojko, to sell them certain real estate in Chicago. The vendees deposited $500 with the defendant as earnest money. Plaintiffs' statement of claim alleged that the deal was never closed due to the failure of the vendees to consummate the deal, and that thereupon under the terms of the contract the vendors were entitled to the earnest money as liquidated damages. The affidavit of defense alleged, in substance, that the deal was not closed because the vendors did not have title to all of the premises which they undertook to sell.

It is conceded by counsel for plaintiffs that they had title at the time of making the contract to only a one-half interest in the premises and, as stated, in his brief, it was the plaintiffs' theory that they "did not have to have the entire title at the time the contract in question was executed, but that all that was necessary was that the said sellers should have a complete title at the date that the deed was to be delivered and conveyance of the property

33898

ANTON SZYMCZYK and KONSTANCYA SZYMCZYK, His Wife,
Appellees,

vs.

JOSEPH ANDREW LAMBERT,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

2551 I.A. 628

MR. PRESIDING JUSTICE MCBURNEY

DELIVERED THE OPINION OF THE COURT.

Plaintiffs, vendors in a contract to sell real estate, brought suit against the defendant who was the holder of the earnest money paid by the proposed purchasers, and upon trial by a jury had a verdict for $800. From the judgment thereon defendant appeals.

October 17, 1923, plaintiffs as vendors made a written contract with the proposed vendees, Roman Lobojko and Sarpa Lobojko, to sell them certain real estate in Chicago. The vendees deposited $800 with the defendant as earnest money. Plaintiffs' statement of claim alleged that the deal was never closed due to the failure of the vendees to consummate the deal, and that thereupon under the terms of the contract the vendors were entitled to the earnest money as liquidated damages. The affidavit of defense alleged, in substance, that the deal was not closed because the vendors did not have title to all of the premises which they undertook to sell.

It is conceded by counsel for plaintiffs that they had title at the time of making the contract to sale a one-half interest in the premises and, as stated, in his brief, it was the plaintiffs' theory that they "did not have to have the entire title at the time the contract in question was executed, but that all that was necessary was that the said sellers should have a complete title at the date that the deed was to be delivered and conveyance of the property

made." Certain cases, like Evans v. Gerry, 174 Ill. 595, which involved a suit for specific performance, so hold. But this is not a suit for specific performance but is to recover money in the hands of a third party, a stakeholder, which was paid not by the plaintiffs but by the vendees. It is also uncontroverted that, when the vendors were informed that the record showed they had title to only a half interest, they promised to obtain the other half interest. It is also not disputed that negotiations were carried on for about six months after the contract was signed, but at no time did the vendors acquire title to the other half interest, or, so far as the record shows, do anything in this respect.

The contract provided that the purchasers should proceed with the sale by paying a further sum "within five days after the title to the realty above described had been examined and found good, or accepted." The evidence demonstrates that the title was neither good nor was it accepted by the proposed purchasers. Therefore, they never were in the position of default and consequently the only condition under which the vendors (the plaintiffs herein) might be entitled to the earnest money did not happen.

There is no dispute as to the material facts and as upon the record before us there can be no recovery by the plaintiffs the judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Matchett and O'Connor, JJ., concur.

made." Certain cases, like Evans v. Gerry, 174 Ill. 398, which involved a suit for specific performance, so hold. But this is not a suit for specific performance but is to recover money in the hands of a third party, a stakeholder, which was paid not by the plaintiffs but by the vendees. It is also uncontroverted that, when the vendors were informed that the record showed they had title to only a half interest, they promised to obtain the other half interest. It is also not disputed that negotiations were carried on for about six months after the contract was signed, but at no time did the vendors acquire title to the other half interest, or, so far as the record shows, do anything in this respect.

The contract provided that the purchasers should proceed with the sale by paying a further sum "within five days after the title to the realty above described had been examined and found good, or accepted." The evidence demonstrates that the title was neither good nor was it accepted by the proposed purchasers. Therefore, they never were in the position of default and consequently the only condition under which the vendors (the plaintiffs herein) might be entitled to the earnest money did not happen.

There is no dispute as to the material facts and as upon the record before us there can be no recovery by the plaintiffs the judgment will be reversed with a finding of fact.

REVERSED FINDING OF FACT.

Matchett and O'Connor, JJ., concur.

FINDING OF FACT.

We find, as an ultimate fact, that the proposed vendees in the contract referred to were not in default; that the deal failed of consummation because the vendors did not have good title to the entire premises described in the contract and made no tender of a good title at any time.

33202 FINDING OF FACT.

We find, as an ultimate fact, that the proposed vendees in the contract referred to were not in default; that the deal failed of consummation because the vendors did not have good title to the entire premises described in the contract and made no tender of a good title at any time.

33635

MORRIS JACOBSON,
Appellant,

vs.

LOUISE B. ALLEN and
JOHN E. TRAEGER, Sheriff
of Cook County,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 I.A. 628

MR. PRESIDING JUSTICE McBURNEY
DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill asking for the vacation of a judgment at law against him for $500 and that a new trial be granted. Upon hearing the chancellor ordered the bill dismissed for want of equity, from which order the complainant appeals.

The gist of complainant's contention is that the placing of the law action upon the trial calendar of the Superior court was contrary to a stipulation made between the parties to the effect that such case would not be placed on trial by either party except upon five days previous notice to the defendants. Defendants assert that (1) the record shows no such stipulation; and (2) even if there were such a stipulation, the circumstances show that complainant Jacobson's counsel was negligent in not ascertaining when the case was placed on trial.

March 17, 1926, the case of Allen v. Jacobson was reached for trial and it was ordered that it be continued generally. June 28, 1928, the case came on for trial. The defendant Jacobson not being present, the jury found the issues for the plaintiff and returned a verdict for $500 and judgment for this amount was entered. October 1, 1928, defendant Jacobson made a motion before his Honor Judge Hopkins of the Superior court, to have said judgment set aside. The motion was supported by an affidavit of the attorney for Jacobson, purporting to set forth the facts of the

25651

MORRIS JACOBSON,
Appellant,

vs.

LOUISE B. ALLEN and
JOHN E. TRAUSER, Sheriff
of Cook County,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Complainant filed a bill seeking for the vacation of a judgment at law against him for $800 and that a new trial be granted. Upon hearing the chancellor ordered the bill dismissed for want of equity, from which order the complainant appeals.

The gist of complainant's contention is that the placing of the law action upon the trial calendar of the Superior court was contrary to a stipulation made between the parties to the effect that such case would not be placed on trial by either party except upon five days previous notice to the defendants. Defendants assert that (1) the record shows no such stipulation; and (2) even if there were such a stipulation, the circumstances show that complainant Jacobson's counsel was negligent in not ascertaining when the case was placed on trial.

March 17, 1926, the case of Allen v. Jacobson was reached for trial and it was ordered that it be continued generally. June 28, 1928, the case came on for trial. The defendant Jacobson not being present, the jury found the issues for the plaintiff and returned a verdict for $800 and judgment for this amount was entered. October 1, 1928, defendant Jacobson made a motion before his Honor Judge Hopkins of the Superior court, to have said judgment set aside. The motion was supported by an affidavit of the attorney for Jacobson, purporting to set forth the facts of the

occurrence. It shows, in substance, that plaintiff asked that the matter be continued generally but the defendant's attorney insisted that, if this was done, a notice be given him and his client at any time the case should be re-instated and placed on the call. The theory of the motion was that the clerk of the court entered the order continuing the case generally but without any reference to any agreement for notice. That motion was denied by Judge Hopkins.

The present bill was filed upon the theory that the case was placed on the trial calendar in violation of the alleged stipulation for a five days notice.

The court could properly have dismissed the bill upon the ground that the record failed to show such a stipulation.

However, even if there were such a stipulation, the circumstances justify the dismissal of the bill. It was duly proven that in July, 1926, by an order entered by the Executive Committee of the Superior court a calendar was made up of all cases then pending, including cases in which the record showed that a five days notice should be given. The case of Allen vs. Jacobson referred to was on such calendar, but was not reached for trial that year. July, 1927, another such order was entered by the Executive Committee of the Superior court and the case in question was placed upon said calendar and assigned to Judge Lewis of the Superior court. The case was reached in its regular order and the judgment was then entered.

As stated by the chancellor in giving his decision in the instant case, when a case is continued to be taken up on five days notice, it means that notice must be given if it is taken up at the time the calendar is called; that when cases are continued on five days notice, they are placed on new calendars at the end of the year and re-assigned to respective judges. Such has been the practice for years. Had the attorney for the defendant

occurrence. It shows, in substance, that plaintiff asked that the matter be continued generally but the defendant's attorney insisted that, if this was done, a notice be given him and his client at any time the case should be re-instated and placed on the call. The theory of the motion was that the clerk of the court entered the order continuing the case generally but without any reference to any agreement for notice. That motion was denied by Judge Hopkins.

The present bill was filed upon the theory that the case was placed on the trial calendar in violation of the alleged stipulation for a five days notice.

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However, even if there were such a stipulation, the circumstances justify the dismissal of the bill. It was duly proven that in July, 1926, by an order entered by the Executive Committee of the Superior court a calendar was made up of all cases then pending, including cases in which the record showed that a five days notice should be given. The case of Allen vs. Jacobson referred to was on such calendar, but was not reached for trial that year. July, 1927, another such order was entered by the Executive Committee of the Superior court and the case in question was placed upon said calendar and assigned to Judge Lewis of the Superior court. The case was reached in its regular order and the judgment was then entered.

As stated by the chancellor in giving his decision in the instant case, when a case is continued to be taken up on five days notice, it means that notice must be given if it is taken up at the time the calendar is called; that when cases are continued on five days notice, they are placed on new calendars at the end of the year and re-assigned to respective judges. Such has been the practice for years. Had the attorney for the defendant

Jacobson paid any attention to the make-up of such calendars he would have seen that his case was assigned to a trial judge and would be called for trial in its order. The failure to notice such orders and calendars was negligence which is chargeable to his client, the complainant herein.

The bill was properly dismissed and the order is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Jacobson paid any attention to the make-up of such calendars he would have seen that his case was assigned to a trial term and would be called for trial in its order. The failure to notice such orders and calendars was negligence which is chargeable to his client, the commissioner herein.

The bill was properly dismissed and the order is affirmed.

AFFIRMED.

Matthews and O'Connor, JJ., concur.

33662

CHARLES CALDWELL,
Plaintiff in Error,

vs.

CHICAGO TITLE AND TRUST COMPANY,
as Administrator de bonis non with
the Will annexed of Hugh A. Cole,
Deceased,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

255 I.A. 628

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Charles Caldwell, plaintiff here, filed a claim in the Probate court against the estate of Hugh A. Cole, deceased, to recover certain moneys, $4,000, alleged to have been paid to the decedent, Hugh A. Cole, upon the purchase of twenty shares of stock of the Cole Manufacturing Co., said to have been sold in violation of the Illinois Securities Law. The claim was denied by the Probate court; upon appeal to the Circuit court, after trial by the court without a jury, plaintiff had judgment, from which defendant appealed to the Supreme court, where it was held that the evidence did not prove a sale of stock by Hugh A. Cole to plaintiff, and that the trial court erred in denying the motion of defendant to find the issues for defendant. The judgment was therefore reversed and the cause remanded. Caldwell v. Cole, 326 Ill. 502. Upon the next trial plaintiff introduced additional evidence and the issues were submitted to a jury, which found for the defendant and it was adjudged that plaintiff take nothing. By this writ of error plaintiff seeks the reversal of this judgment.

Hugh A. Cole was president of the Cole Manufacturing Company which had been engaged in manufacturing stoves and furnaces for twenty-five years in Chicago. At one time it was a partnership and at another time it was a common law trust. In 1919 it was

38659

CHARLES CARPENTER,
Plaintiff in Error,

vs.

CHICAGO TITLE AND TRUST COMPANY,
as Administrator de bonis non with
the Will annexed of Hugh A. Cole,
Deceased,
Defendant in Error.

Error to Superior Court of Cook County.

Charles Carpenter, formerly Pyle, filed a claim in the probate court against the estate of Hugh A. Cole, deceased, to recover certain money, in, and, alleged to be the [illegible] of the decedent, Hugh A. Cole, upon the pledge [illegible] of stock of the Cole Manufacturing Co., said to have been sold in violation of the Illinois Securities Law. The claim was denied in the probate court; upon appeal to the circuit court, after trial by the court without a jury, judgment was entered, [illegible] upon appealed to the supreme court, where it was [illegible] the evidence did not prove a sale of stock by [illegible] Cole to claimant, and that the trial court erred in [illegible] the entire of evidence to find the issue for defendant. The judgment was therefore reversed and the cause remanded. (Carpenter v. Cole, 320 Ill. 3[illegible]) On the next trial plaintiff in reduced [illegible] evidence and the issues were submitted to a jury, which found [illegible] and it was adjudged that plaintiff take nothing. [illegible] plaintiff seeks the reversal of this judgment.

Hugh A. Cole was [illegible] Company which had been [illegible] for twenty-five years [illegible] and at another time it was a [illegible]. In 1920 it was

incorporated with a capital stock of $1,000,000. W. D. Berry was one of the partners in the business and after the incorporation owned 500 shares of stock and was assistant secretary of the corporation. In about the early part of 1920 Berry contemplated selling all his stock and retiring from the company, and in pursuance of this plan his stock was sold.

The question of fact presented for the determination of the jury was whether, as claimed by plaintiff, Berry sold all his stock to Hugh A. Cole, who, in turn, sold twenty shares of it to plaintiff; or whether, as claimed by defendant, Berry sold this twenty shares to plaintiff. The jury was evidently of the opinion that plaintiff had failed to prove that he bought the stock from Hugh A. Cole and returned a verdict for defendant. There was variant and contradictory testimony on this decisive issue, but after giving due consideration to the record we are unable to say that the verdict of the jury was manifestly against the weight of the evidence.

Apparently Berry, after selling out his interest in the company, retired to Florida. He did not testify on the previous trial, but at the present trial his testimony was had, in which he claimed that he sold all of his 500 shares of stock to Hugh A. Cole on February 28, 1920, and a written instrument was introduced in evidence, executed by Cole and Berry and his wife Lena W. Berry, purporting to be an agreement whereby Cole purchased 500 shares of stock in the Cole Manufacturing Company held by William D. Berry and Lena W. Berry at $200 per share. A receipt for $10,000 paid on account was acknowledged by William and Lena Berry, the balance of $90,000 to be paid before April 1, 1920.

The theory of the defendant is that this agreement was abandoned by the parties and that Berry undertook to sell and did sell his stock in small parcels to various employees of the Cole

incorporated with a capital stock of $1,000,000. W. B. Berry was one of the partners in the business and after the incorporation owned 300 shares of stock and was assistant secretary of the corporation. In about the early part of 1920 Berry contemplated selling all his stock and retiring from the company, and in pursuance of this plan his stock was sold.

The question of fact presented for the stipulation of the jury was whether, as claimed by plaintiff, Berry sold all his stock to Hugh A. Cole, who, in turn, sold twenty shares of it to plaintiff; or whether, as claimed by defendant, Berry sold this twenty shares to plaintiff. The jury was evidently of the opinion that plaintiff had failed to prove that he bought the stock from Hugh A. Cole and returned a verdict for defendant. There was various and contradictory testimony on this decisive issue, but after giving due consideration to the record we are unable to say that the verdict of the jury was manifestly against the weight of the evidence.

Apparently Berry, after selling out his interest in the company, retired to Florida. He did not testify on the previous trial, but at the present trial his testimony was that, if either he claimed that he sold all of his 300 shares of stock to Hugh A. Cole on February 28, 1920, and a written instrument was introduced in evidence, executed by Cole and Berry and his wife Lena V. Berry, purporting to be an agreement whereby this transferred 300 shares of stock in the Cole Manufacturing Company owned by William C. Berry and Lena V. Berry at $500 per share. A receipt for $150,000 paid on account was acknowledged by William and Lena Berry, the balance of $300,000 to be paid before April 1, 1921.

The theory of the defendant is that this agreement was abandoned by the parties and that Berry undertook to sell the said his stock to small people to continue employed at the Cole

Manufacturing Company, among them the plaintiff. To support this version attention is called to the writing across the margin of this agreement, wherein Cole acknowledges receipt of 500 shares of stock from Berry "for purpose of delivery to the individual purchasers." Also endorsed on this instrument in the handwriting of Berry were figures showing amounts paid by various parties for the Berry stock and the amount of stock acquired by each person. This includes Caldwell's (plaintiff's) twenty shares. These endorsements total 500 shares of stock, the amount of Berry's holdings, and the aggregate of the amounts paid was $100,000.

The jury could properly believe that this document with its endorsements tended to prove that, while in the first instance Cole intended to buy all of the Berry stock, yet the transactions in fact were between Berry and the various parties whose names appear endorsed on the document and that the delivery of the 500 shares of stock by Berry to Cole was merely for the purpose of having said shares of stock transferred to the various purchasers indicated by the endorsements of Berry, including twenty shares to plaintiff.

Plaintiff also introduced evidence of two witnesses to the effect that each of them had purchased in March, 1920, from Hugh A. Cole stock in the Cole Manufacturing Company, but, on the other hand, was the testimony of J. M. Thomas to the effect that he bought from W. D. Berry 100 shares of stock on March 1, 1920, and of E. G. Goodchild that he bought 40 shares from Berry on March 2, 1920, and of Edward P. Cole that he bought 75 shares from Berry on March 30, 1920.

The jury could properly believe that Berry's conduct leading to the transfer of portions of his stock to these men was inconsistent with and tended to contradict plaintiff's version that Berry's stock was all sold to Hugh A. Cole, who, in turn, made the

manufacturing company, among [illegible] the plaintiff. To support this version attention is called to the written agreement [illegible] agreement, wherein [illegible] knowledge [illegible] of 300 shares [illegible] from Berry "for purpose of delivery [illegible] individual warrants." Also emphasized on this instrument in the handwriting of Berry were figures showing amounts paid by various persons for the Berry stock and the amount of stock acquired by the person. This includes Caldwell's (plaintiff's) twenty shares. There is [illegible] total 800 shares of stock, the amount of Berry's holdings, but the aggregate of the amounts paid was [illegible].

The jury could properly believe that this testimony with the endorsements tended to prove that, while [illegible] defendant Cole intended to buy all of the [illegible] stock, yet the transaction in fact were between Berry and the various persons whose names appear endorsed on the document [illegible] the defendant, as the [illegible] shares of stock by Berry to [illegible] the purchase of [illegible] having with shares of stock transferred or [illegible] indicated by the only [illegible] of Berry, [illegible] shares to plaintiff.

[illegible] the effect that [illegible] the defendant in the [illegible] Tuge a. sold stock in the Cole Manufacturing Company, [illegible] other hand, was the [illegible] be bought from [illegible] Berry [illegible] and of [illegible] 8, 1920, and of [illegible] on March [illegible] Berry on March [illegible], 1920.

The jury could [illegible] leading to the transfer of positions [illegible] inconsistent with and [illegible] a verdict [illegible] Berry's stock was all [illegible] [illegible]

sales of portions of the same to some half dozen individuals.

It also was in evidence that the stock purchased by Caldwell as well as that purchased by Thomas Goodchild and Edward F. Cole was transferred on the stock book directly from W. D. Berry or his wife Lena W. Berry to the various purchasers or their wives on instructions given by Berry to Brelsford, then secretary of the company. The Berry certificates were all given to Brelsford in March, 1920, and Berry received the cash or securities in payment of said shares directly from the purchasers. It was also in evidence that at the time of the last trial Berry had been sued in the State of Florida by several of these purchasers of stock seeking to recover their money paid for the same.

From these and many other circumstances which it would unduly prolong this opinion to narrate, we cannot say that the jury was not justified in returning its verdict.

Plaintiff in his brief next asserts that the court erred in compelling him to re-open his case and introduce further evidence, shifting the burden of proof to plaintiff to show that the sale was not exempted under the Securities Act. This point is not covered by plaintiff's assignment of errors and in any event, as we are of the opinion that plaintiff failed to prove that Hugh Cole sold the stock in question to plaintiff, the error, if any, was not serious.

The court properly admitted in evidence on behalf of defendant some eight certificates in various amounts showing the endorsement and transfer of these to the respective purchasers , endorsed by William D. Berry or by his wife, Lena W. Berry, by W. D. Berry, her attorney in fact. It was also proper to admit in evidence the stubs of stock certificates in the capital stock book showing the transfer of various shares of the Berry stock to Goodchild, Thomas, Caldwell (plaintiff), and Dorothy Cole, wife of

sales of portions of the same to some 5 of them individually.

It also was in evidence that the stock purchased by Gladwell as well as that purchased by Thomas Goodwin and Howard B. Cole was transferred on the stock book directly from T. C. Berry or his wife Anna S. Berry to the various purchasers or their wives on instructions given by Berry as President, then secretary of the company. The Berry certificates were all given to Brainford in March, 1921, and Berry received the cash or consideration in payment of said shares directly from the purchasers. It was also in evidence that at the time of the last trial Berry had been sued in the State of Florida by several of these purchasers of stock seeking to recover their money paid for the same.

Even those who carry other circumstances with them would warily pronounce this opinion to portend, we cannot say that the jury was not justified in returning its verdict.

Plaintiff in his brief most earnestly that the court erred in compelling him to re-open his case for introduce further evidence, auditing the further evidence proved to establish to show that the mine was not one plus under the account law suit. This point is not covered by plaintiff's assignment of errors and in any event, as we are of the opinion that plaintiff failed to prove that Hugh Cole sold the stock in question as alleged, the error, if any, was not serious.

The court properly instructed a verdict as to all defendants some eight certificates in various amounts covering the entanglement and transfer of stock to the respective purchasers endorsed by William C. Berry, or his wife, Anna S., Berry, by C. D. Berry, her attorney in fact. It was also in evidence that in evidence the issue of stock was in the capital stock book showing the transfer of stock as shown by the Berry also by Goodwin, Thomas, Goldsmith and Mrs. Mercy Cole, with of

Edward P. Cole. While such evidence may not have been conclusive, it was competent to show the entire transaction and as tending to support defendant's theory that the stock purchased by plaintiff was sold to him by Berry and not by Hugh A. Cole. The letter from Berry to J. M. Thomas under date of February 6, 1920, discussing the purported sale of stock to Thomas and its value, was likewise competent.

Complaint is made of the fifth instruction given on behalf of defendant, in that it required the plaintiff, before he could recover, to show that the stock belonged to Hugh A. Cole and also that it was sold to others "in the course of repeated and continued transactions." We may concede that this instruction is inaccurate as a general statement of the law. Sales may be in violation of the law, although not made by the owner of the stock. However this may be, plaintiff cannot complain of this instruction. His amended claim asserted that Hugh A. Cole was the owner of the stock in question and this was the theory on which he prosecuted his claim. Furthermore, in instruction 2 given at the request of plaintiff are the identical inaccuracies contained in the instruction given on behalf of the defendant. It is well settled that a party cannot complain of a fault in an instruction, where the instructions of the complaining party are open to the same criticism. Harney v. Sanitary District of Chicago, 260 Ill. 54.

Other questions are discussed by respective counsel, upon which it is unnecessary for us to comment. The decisive question is one of fact and, if Hugh A. Cole did not sell the stock in question to plaintiff, other questions are not important. We would not be justified in setting aside the verdict of the jury in this respect, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

Edward E. Cole. While such evidence may not have been conclusive, it was competent to show the entire transaction and so tending to support defendant's theory that the stock purchased by plaintiff was sold to him by Berry and not by Edgar A. Cole. The letter from Berry to J. . Thomas under date of February , 1890, discussing the purported sale of stock to Thomas and its value, was likewise competent.

Complaint is made of the fifth instruction given on behalf of defendant, in that it required the plaintiff, before he could recover, to show that the stock belonged to Edgar A. Cole and also that it was sold to others "in the course of regulated and continued transactions." We may concede that this instruction is inaccurate as a general statement of the law. Sales may be in violation of the law, although not made by the owner of the stock. However this may be, plaintiff cannot complain of this instruction. His counsel claim asserted that Edgar A. Cole was the owner of the stock in question and this was the theory on which the prosecution his claim. Furthermore, in the instruction given at the request of plaintiff, are the identical inconsistent contained in the instruction given on behalf of the defendant. It is well settled that a party cannot complain of a fault in an instruction, where the instructions of the opposing party are open to the same criticism. Kenney v. Bankers Life Ins. Co. of Nebraska, 79 Ill. App. 51.

Other questions are discussed by counsel on appeal, upon which it is unnecessary for us to comment. The principle question in our of fact and, it does, Cole did not real the stock in question to plaintiff, other questions are [illegible] would not be justified in setting aside the verdict [illegible] this reason, and the judgment is affirmed.

Affirmed.

Lacombe and O'Connor, JJ., concur.

33673

FRED C. BEST, Receiver,
Defendant in Error,

vs.

GEORGE HUGHES and JEAN WILLSON HUGHES,
Plaintiffs in Error.

ERROR TO SUPREME COURT OF COOK COUNTY.

255 I.A. 629

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment against them of $3738.78 entered after their affidavit of merits and pleas were stricken.

The suit was brought on two promissory notes made by the defendants to the order of "themselves" and by them endorsed, in and by which they promised to pay to C. A. Blair & Company, Inc., $1,000 12 months after date and $2,000 18 months after date, with interest at 6 per cent per annum. The declaration alleged the transfer and delivery of said notes to the Wisconsin Mortgage & Securities Company before maturity, which transferred them to E. A. Reddeman, who thereafter transferred them to the plaintiff, Fred C. Best, receiver. Copies of the notes were attached which showed that they were secured by a trust deed on real estate in Osceola County, Florida.

The plea which, on plaintiff's motion, was stricken by the court for insufficiency alleges that the consideration for the notes was wholly failed; that before the notes were made the payee, C. A. Blair & Company, agreed with defendants to sell them certain real estate for the price of $6,000; that thereupon defendants paid to the seller $3,000 in cash, receiving a deed; that in the deed conveying the premises the seller, payee in the notes, agreed without cost to defendants to install certain improvements, as follows: "1. Construct or erect wires or conduits

FRED C. BEST, Receiver,
Defendant in Error,

vs.

GEORGE RUDNER and JAMES ILLOVA RUDNER,
Plaintiffs in Error.

ERROR to the DISTRICT COURT
OF WOOD COUNTY.

MR. JUSTICE DE TIEN RENDERED
THE OPINION OF THE COURT.

Defendants seek the reversal of a judgment against them of $1723.78 entered after their demurrer to the petition was sustained.

The suit was brought on two promissory notes made by the defendants to the order of "themselves" and by them endorsed, in the order which they stand, to say to wit, C. Black & Company, Inc., $1,000 18 months after date and $2,000 12 months after date, with interest at 6 per cent per annum. The petition alleged the transfer and delivery of said notes to the plaintiff Martin & Scourfield company, before maturity, which transferred them to F. ... Bohanon, who thereafter transferred them to the plaintiff, Fred C. Best, receiver. Copies of the notes were attached which showed that they were endorsed by a stamp, "Pay to Fred Best in Oregon City, Oregon".

The plaintiff's petition, as amended, was sustained by the trial court for [illegible] the demurrer was for the notes was wholly lacking [illegible] the payee, C. A. Black & Company, signed with [illegible] them certain real estate for the price of [illegible] that thereupon defendants paid to the seller $3,000 in cash, the balance [illegible] that in the deed covering the purchase the seller, [illegible] notes, agreed without cost to defendants to install certain improvements, as follows: "1. Construct a street [illegible] a

for electricity to said lots. 2. Lay water supply mains to said lots. 3. Build concrete sidewalk, curb, and hard surface street in front of said lots. 4. Construct parkway and plant shrubbery as shown on plat. 5. Put in proper sewer connections to said lots." Defendants asserted that the notes on which suit was brought were executed and delivered by them "to secure the payment of a part of said price and upon the sole consideration of the performance of the covenants in said deed contained." It was further alleged that the payee in the notes since the execution thereof had failed and refused to install said improvements and that the subsequent assignees well knew these facts, and therefore defendants denied any indebtedness to plaintiff.

The well known rule is that pleadings must be taken in the sense most unfavorable to the pleader and where the language is doubtful, the most unfavorable construction must be adopted, for the pleader must always be presumed to state his case as strongly in his favor as it will bear. Van Sant v. Rose, 260 Ill. 401. Mere conclusions stated by the pleader are not sufficient. Kadison v. Fortune Bros. Brewing Co., 163 Ill. App. 276. Testing the affidavit of merits by these rules, we find that its allegations of facts do not show failure of consideration. Defendants aver in substance that the payee in the notes agreed to sell them certain real estate for $6,000, $3,000 to be paid in cash and the balance of $3,000 in notes, and that the deal was consummated on this basis. True it is that the defendants after asserting that the $3,000 notes were given as part of the purchase price also aver that they were given "upon the sole consideration of the performance of the covenants in said deed," evidently meaning the covenants for the improvements. Manifestly, the notes could not at the same time be given as part of the purchase price of the real estate and also as the sole consideration for the making of the improvements. The

for electricity to said lots. 3. Lay extra sewerage mains to said lots. 5. Build concrete sidewalk, curb, and hard surface street in front of said lots. 6. Construct parking and place shrubbery as shown on plat. 7. Put in proper sewer connections to said lots." Defendants asserted that the notes on which suit was brought were executed and delivered by them "in reliance upon the payment of a part of said price and upon the satisfactory completion of the performance of the covenants in said contract." It was further alleged that the payee in the notes sued on had repudiated the contract and failed and refused to install said improvements and that the subsequent assignees well knew that [illegible] and therefore defendants should not be [illegible] on liability.

The well known rule is that liability must be taken in the sense most unfavorable to the pleader on [illegible] demurrer. Language is doubtful, the most unfavorable construction must be [illegible], for the pleader must always be presumed to state his case as strongly in his favor as it will bear. Van Dorn v. Ross, 85 [illegible] 111. [illegible] conclusions stated by the pleader are not sufficient. [illegible] v. Fortune Prod. Service Co., 143 Ill. App. 257. Testing the sufficiency of merits by these rules, we find that the allegations of [illegible] do not show failure of consideration. Defendants [illegible] that the payee in the notes agreed to sell them certain real estate for $6,000, $ [illegible],000 to be paid in cash and [illegible] in notes, and that the deal was consummated on June [illegible]. [illegible] it is that the defendants [illegible] were given as part of the purchase price [illegible] given "upon the sole consideration of the satisfactory [illegible] made in said deed," evidently meaning the conveyance [illegible] improvements. Manifestly, the notes [illegible] given as part of the purchase price of the real [illegible] the sole consideration for the execution of the [illegible]. The

affidavit in this respect is contradictory.

Defendants argue in this court upon the erroneous presumption that they have alleged in their affidavit of merits that the cash payment of $3,000 was paid for the real estate and that the notes for $3,000 were given solely for the improvements specified. This, of couse, contradicts the allegation of fact that the purchase price of the real estate was $6,000.

The covenants in the deed concerning the improvements were collateral agreements to be performed at some time in the future. So far as shown by the affidavit of merits, no time is fixed for their performance, which may have been subsequent to the maturity of the notes. The defendants seem to have been satisfied to rely upon the covenants to make such improvements at some future time. They have not offered to reconvey the land nor brought suit to cancel the deed or the notes nor to rescind the transaction. If there has been a breach of the covenants the defendants may recover any damages they may have sustained. Willets v. Burgess, 34 Ill. 494; Smith v. Western Trust & Guaranty Co., 150 Ill. App. 587; and Denger v. McAvoy, 224 Ill. App. 359.

The instant plea itself shows a consideration for the notes and that it also attempts to show a breach of covenants with reference to improvements does not make it a plea of no consideration.

Defendants claim that the amount of the judgment is in excess of the ad damnum. This excess evidently arose from the interest accruing between the time the declaration was filed and the time when the case was tried, something over a year. Under such circumstances it has been held that the judgment was proper. Gradle v. Hoffman, 105 Ill.147; Layman v. Detharding, 106 Ill. App. 594. It has also been held in Grand Lodge A.O.U.W. v. Bagley, 164 Ill. 340, that advantage of such irregularity in the amount of the damages should have been sought by motion made at the time of

affidavit in this respect is contradictory.

Defendants argue in this court upon the erroneous presumption that they have alleged in their affidavit of merits that the cash payment of $3,000 was paid for the real estate and that the notes for $3,000 were given solely for the improvements specified. This, of course, contradicts the allegation of fact that the purchase price of the real estate was $6,000.

The covenants in the deed evidencing the improvements were collateral agreements to be performed at some time in the future. So far as shown by the affidavit of merits, no time is fixed for their performance, which may have been subsequent to the maturity of the notes. The defendants do not have been satisfied to rely upon the covenants to make good improvements at some future time. They have not offered to reconvey the land nor brought suit to cancel the deed or the notes nor to rescind the transaction. If there has been a breach of the covenants the defendants may recover any damages they may have sustained. Wilkie v. Burgess, 94 Ill. App. 1; Gaskin v. Chicago Guaranty Co., 18 Ill. App. 527; and Cooper v. Harvey, 108 Ill. App. 339.

The instant case itself shows a complete failure for the notes and that it was attempted to shove a breach of covenants with reference to improvements does not make it a plea of no consideration.

Defendants claim that the amount of the judgment is in excess of the $2 damages. This answer relates back to the interest according between the time of delivery of the notes and the time when the cash was paid, something over a year. Under such circumstances it has been held that the judgment was proper. Gratis v. Dolton, 100 Ill.147; Lawson v. Lawson, 148 Ill. 396, 394. It has also been held in Wright Cooper v. Lewis, 154 Ill. 340, that advantage of such irregularity in the amount of the damages cannot be taken for the first time on appeal.

entering the judgment, thus giving plaintiff an opportunity to amend. Such an amendment would be one of form rather than substance. See also The People v. May, 276 Ill. 332; Boston Store v. Hartford Acc. & Indemnity Co., 227 Ill. App. 192.

The judgment was proper and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

entering the judgment, thus giving plaintiff an opportunity to amend. Such an amendment could be one of form rather than substance. See also *Tom Pepsis v. Ehr*, 276 Ill. App. 1931; *Lyman Sears v. Hartford Acc. & Indemnity Co.*, 227 Ill. App. 1922.

The judgment was proper and it is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

33683

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

STANLEY WARANOWSKI,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

255 I.A. 629

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was found guilty by a jury of receiving stolen property and was sentenced to one year's imprisonment in the House of Correction and to pay a fine of $1,000. He asks that this judgment be reversed. We are constrained to send the case back for another trial for the reason that it is not clear that defendant was proved guilty beyond a reasonable doubt, and there was improper evidence introduced at the trial.

A merchant, Bernard M. Kantor, on January 5, 1928, about six o'clock in the evening was delivering merchandise from his automobile in the vicinity of number 4533 Hermitage avenue. While he was away from the machine for a short time four boys, William and Mike Chaplick, Walter Koziel and Mike Kasimena, took a satchel and three packages of silk said to be worth $2500 from Kantor's car. The goods were taken by the boys to 4524 South Wood street, and part of them were hidden in the basement and part in the attic. Defendant occupied the first floor at this number, with a soft drink parlor in the front and living rooms in the rear; the boy Kasimena lived on the second floor, and Mike Chaplick lived in a cottage in the rear. Both the basement and the attic were unoccupied and were accessible from the outside.

Mike Chaplick, eighteen years old, testified that he and his brother William hid the goods in the basement and in the attic, entering both places from the outside, and when they came

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

STANLEY MARANOWSKI,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

Plaintiff was found guilty by a jury of receiving stolen property and was sentenced to one year's imprisonment in the house of Correction and to pay a fine of $1,000. He seeks that this judgment be reversed. We are constrained to send the case back for another trial for the reason that it is not clear that defendant was proved guilty beyond a reasonable doubt, and there was improper evidence introduced at the trial.

A merchant, Bernard S. Baker, on January 2, 1934, about six o'clock in the evening was delivering merchandise from his automobile in the vicinity of number 4833 Kenmore Avenue. While he was away from the machine for a short time four boys, William and Mike Chapelick, Walter Koziel and Mike Lewinsky, took a suitcase and three packages of silk said to be worth $2000 from Baker's car. The goods were taken by the boys to 4834 South Wood street, and part of them were hidden in the basement and part in the attic. Defendant occupied the first floor as a rooming house, with a soft drink parlor in the front and living rooms in the rear; the boy Lewinsky lived on the second floor, and Mike Chapelick lived in a cottage in the rear. Both the basement and the attic were accessible and were accessible from the outside.

Mike Chapelick, eighteen years old, testified that he and his brother William had the goods in the basement and in the attic, entering both places from the outside. On the day same

out Mike had $5 which he divided up with the others. He denied that he sold the goods to the defendant. He admitted that he divided $5 with the younger boys and that he had told them that he had sold the goods to the defendant, but testified that this was not true; that he told the boys this because he intended to keep the goods for himself. William Chaplick was not apprehended.

On behalf of the People a police officer, Berounsky, testified that he had a conversation at the station with the boys in the presence of the defendant and that Mike Chaplick said that he had sold the goods to the defendant for $10, getting $5 in cash and was to get the other $5 later on, but defendant denied that this was true. Statements accusing one of crime are not admissible where the one accused denies the truth of such statements. People v. Harrison, 261 Ill. 517; People v. Schallman, 273 Ill. 564.

Walter Koziel, age twelve, was permitted to testify that when Mike Chaplick came out of the defendant's yard he told the boys that defendant had given him $5 for the goods and divided the money with them. Such evidence was clearly incompetent. Improper evidence was introduced without objection, nor is its incompetency asserted in this court.

Defendant testifying denied that he had any knowledge that the stolen goods were on his premises until after his arrest. The police officer testified that, when he called on the defendant, he was given permission to examine the premises and found the goods in the basement; that subsequently defendant notified the police officers that he had learned that some of the goods were in the attic and they also were recovered.

If, without the improper evidence introduced without objection, we could say that defendant was proven guilty beyond any

out Mike had $5 with; he divided up with the others. He denied that he sold the goods to the defendant. He admitted that he divided $5 with the younger boys and that he had told them that he had sold the goods to the defendant, but testified that this was not true; that he told the boys that because he intended to keep the goods for himself. William Chaplick was not a witness.

On behalf of the People a police officer, Hennessy, testified that he had a conversation at the station with the boys in the presence of the defendant and that Mike Wagnerski said that he had sold the goods to the defendant for $10, getting $5 in cash and was to get the other $5 later on, but defendant denied that this was true. Statements incriminating one of crime are not admissible where the one accused denies the truth of such statements. People v. Harrison, 201 Ill. 317; Hamlin v. Commonwealth, 273 Ill. 566.

Walter Nowicki, the bailee, was permitted to testify that when Mike Chaplick came out of the defendant's yard he told the boys that defendant had given him $5 for the goods and divided the money with them. Such evidence was clearly incompetent. Improper evidence was introduced without objection, nor is its incompetency asserted in this court.

Defendant testifying denied that he had any knowledge that the stolen goods were on his premises until after his arrest. The police officer testified that, when he called on the defendant, he was given permission to examine the premises and found the goods in the basement; that subsequently defendant notified the police officers that he had learned that some of the goods were in the attic and they also were recovered.

If, without the improper evidence introduced without objection, we could say that defendant was proven guilty beyond any

reasonable doubt, we would not disturb the judgment. People v. Anderson, 239 Ill. 168. But the record does not warrant this conclusion. A jury should be permitted to consider only competent legal evidence. The case should be re-tried so that only such evidence may be presented, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

reasonable doubt, we would not disturb the judgment. People v. Anderson, 239 Ill. 183. But the record does not warrant this conclusion. A jury should be permitted to consider only competent legal evidence. The case should be re-tried so that only such evidence may be presented, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

33689

HAROLD FANDORF, a Minor, by Walter Fandorf, his Father and Next Friend,
Defendant in Error,

vs.

LAWRENCE QUIRICI and THE WHISTLE BOTTLING COMPANY, a Corporation,
(Defendants).

On Writ of Error of LAWRENCE QUIRICI,
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

255 I.A. 629

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, brought suit for injuries received through the bursting of a glass bottle containing a drink called Whistle, particles of the broken glass striking one of his eyes. Upon trial he had a verdict against the defendants for $5,000, upon which judgment was rendered. Defendant Quirici sued out this writ of error seeking to have the judgment reversed. His co-defendant, Whistle Bottling Company, a corporation, was served by publication but, not appearing, an order of severance has been entered and defendant Quirici prosecutes this writ of error alone.

The evidence is not before us and the only point made is that the declaration fails to state a joint cause of action. The declaration consists of two counts, the first alleging that on June 21, 1923, defendant Quirici was in possession of and occupied a store at 4700 West 22nd street, Cicero, Illinois, retailing soft drinks, etc.; that the defendant Whistle Bottling Company manufactured and bottled a drink called Whistle and sold the same to retail merchants, and Quirici had purchased divers quantities of such drink and had invited plaintiff and others to purchase the same; that this drink was manufactured from various ingredients according to a formula then known and used by the Whistle Bottling Company; that one of these ingredients caused the bottles to

BARNEY VARGHESE, a minor, by Walter
Hardert, his father and next friend,
Defendant in error,

vs.

[illegible] QUAILI [illegible] RAILWAY
[illegible] COMPANY, a corporation,
Defendant.

On Writ of Error to [illegible]
Reliability in [illegible].

[illegible]

Mr. [illegible] for Appellant.

[illegible] for Appellee.

[illegible]

Reliability [illegible], brought suit for injuries received through the breaking of a [illegible] coupling, a thing called Whistle, property of the [illegible] station [illegible] of his [illegible]. Upon trial he had a verdict [illegible] for [illegible], upon which judgment was rendered. [illegible] writ of error seeking to have the judgment reversed. In defendant, Whistle Detailing Company, [illegible], was served by publication but, not appearing, no order of [illegible] has been entered and defendant [illegible] [illegible] writ of error [illegible].

The evidence [illegible] in the trial court [illegible] in that the [illegible] in [illegible] a joint cause of action. The defendants consists of two counts, [illegible] on June 21, 1919, [illegible] plaintiff was [illegible] and [illegible] engaged a [illegible] at [illegible] [illegible] line [illegible] links, etc.; that the [illegible] manufactured and [illegible] to [illegible] to really [illegible], and [illegible] of [illegible] links and [illegible] the same; that this link was [illegible] according to a [illegible] [illegible] [illegible].

explode on divers occasions; that plaintiff was lawfully on the premises of Quirici as a customer, and that it was the duty of Quirici to so operate and conduct his business as to avoid injuring the plaintiff, but Quirici negligently, carelessly and improperly handled, shook and otherwise dispensed the said soft drink called Whistle so as to cause the same to explode; that it was the duty of the Whistle Bottling Company not to so manufacture the drink out of ingredients which would cause the same to explode, yet the company so carelessly bottled the said drink and employed ingredients in and about its manufacture as to cause the same to explode and burst the glass bottle in which the drink had been bottled. In consequence of the several acts of negligence of defendants plaintiff was injured by the explosion of one of the bottles containing said drink, receiving permanent injuries to his eyes.

The second count alleges that the Whistle Bottling Company had been long prior to the date of the accident engaged in manufacturing, bottling and selling said drink called Whistle and for a long period of time had sold said Whistle to the defendant, Quirici; that Quirici so negligently operated his business as to cause one of the bottles containing Whistle to explode and negligently, carelessly and improperly attempted to remove the cap, cork or seal of said bottle, thereby causing the bottle to become shattered and broken.

Counsel for defendant Quirici concedes in his brief that the declaration states a good cause of action against this defendant, but asserts that the declaration does not contain sufficient averments that the two defendants were jointly liable. If the declaration is good as against the defendant Quirici, we do not understand under what rule he may question the sufficiency of

explode on divers occasions; that plaintiff was lawfully on the premises of Quirici as a customer, and that it was the duty of Quirici to so operate and conduct his business as to avoid injuring the plaintiff, but Quirici negligently, carelessly and improperly handled, shook and otherwise disturbed the said soft drink called Whistle so as to cause the same to explode; that it was the duty of the Whistle Bottling Company not to so manufacture the drink out of ingredients which would cause the same to explode, yet the company so carelessly bottled the soft drink and employed ingredients in and about its manufacture as to cause the same to explode and burst the glass bottle in which the drink had been bottled. In consequence of the several acts of negligence of defendants plaintiff was injured by the explosion of one of the bottles containing said drink, receiving permanent injuries to his eyes.

The second count alleges that the Whistle Bottling Company had been long prior to the date of the accident engaged in manufacturing, bottling and selling soft drink called Whistle and for a long period of time has said said Whistle to the defendant, Quirici; that Quirici so negligently operated his business as to cause one of the bottles containing Whistle to explode and negligently, carelessly and improperly attempted to remove the cap, cork or seal of said bottle, thereby causing the bottle to become shattered and broken.

Counsel for defendant Quirici concedes in his brief that the declaration states a good cause of action against said defendant, but asserts that the declaration does not contain sufficient averments that the two defendants were jointly liable. If the declaration is good as against the defendant Quirici, we do not understand under what rule he may question the sufficiency of

the same as to joint liability, when the co-defendant does not appear in this court to question the judgment. The fact that the declaration charges that both defendants are guilty of negligence does not require proof of a joint liability to authorize a recovery, and if the guilt of one is proven a recovery against him is authorized. Pierson v. Lyon & Healy, 243 Ill. 370; Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249. In an action of tort against several defendants the court may enter judgment against one and permit the suit to be dismissed as to the others. I.C.R.R.Co. v. Foulks, 191 Ill. 57. If in the instant case plaintiff should dismiss as to the Whistle Bottling Company, the judgment against Quirici would be proper. Why, then, should it be improper because judgment is also against his co-defendant, who does not complain?

This case calls for the application of the rule that, after judgment, pleadings are liberally construed in order to sustain the judgment, and defects or omissions in a pleading which might have been fatal on demurrer are cured by verdict, and where issues joined necessarily required proof of facts defectively stated and without which it is not to be presumed that the verdict would have been rendered, such defects or omissions are cured by verdict. Plew v. Board, 274 Ill. 232; Sargent Co. v. Raublis, 215 Ill. 428; Wagner v. C.R.I. & P.R.R.Co., 200 Ill. App. 305; C. & A.R.R.Co. v. Clausen, 173 Ill. 100; Jackson v. Burns, 203 Ill. App. 196; Kessenger v. Wendell, 211 Ill. App. 374. We must assume that the evidence justified the jury in returning a verdict against both defendants and therefore the omission, if any, of apt words charging joint liability is cured by the verdict.

We see no convincing reason to reverse the judgment and it is therefore affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

the same as to joint liability, when the co-defendant does not appear in this court to question the judgment. The fact that the declaration charges that both defendants are guilty of negligence does not require proof of a joint liability to authorize a recovery, and if the guilt of one is proven a recovery against him is authorized. Pierson v. Lyon & Healy, 263 Ill. 370; Postal Telegraph-Cable Co. v. Lilge, 223 Ill. 488. In an action of tort against several defendants the court may enter judgment against one and permit the suit to be dismissed as to the others. I.C.R.R. Co. v. Donlin, 191 Ill. 87. If in the instant case plaintiff should dismiss as to the Shields Building Company, the judgment against Quirici would be proper. Why, then, should it be improper because judgment is also against his co-defendant, who does not complain?

This case calls for the application of the rule that, after judgment, pleadings are liberally construed in order to sustain the judgment, and defects or omissions in a pleading which might have been fatal on demurrer are cured by verdict, and errors issues joined necessarily required proof of facts definitely stated and without which it is not to be presumed that the verdict would have been rendered, such defects or omissions are cured by verdict. Pier v. Doyle, 274 Ill. 458; Pittsburgh, C., C. & St. L. R. R. Co. v. Donlin, 218 Ill. 428; Dwyer v. I.C.R.R. Co., 24 Ill. App. 348; C. & A.R.R.Co. v. Vanness, 179 Ill. 144; Jackson v. Burns, 203 Ill. App. 196; Kennedy v. Bandell, 241 Ill. App. 474. It must assume that the evidence justified the jury in returning a verdict against both defendants and therefore the ordinance, in any, of not more charging joint liability is cured by the verdict.

We see no sufficient reason to reverse the judgment and it is therefore affirmed.

AFFIRMED.

Kilbourn and O'Connor, JJ., concur.

33719

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARY STEFANIUK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

255 I.A. 629

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, upon trial by the court, was found guilty of encouraging Anna Villanova, under the age of eighteen years, to become a delinquent child, and was sentenced to imprisonment in the House of Correction of Cook county for the term of six months, and also to pay a fine of $100.

We are not content to let this judgment stand. Incompetent evidence was heard and the evidence is not convincing beyond a reasonable doubt as to defendant's guilt.

Defendant owns and conducts a small hotel of 25 rooms at 11919 Emerald avenue, Chicago; the rooms are rented mostly to workmen employed in the nearby factories; occasionally the rooms are rented to married couples. About one o'clock in the morning of May 16, 1929, Anna Villanova with a man named Verbie rang the door bell of defendant's hotel, to which defendant responded. The man talked to her in Polish and told her that he and his wife had just come from Detroit and wanted a room. Defendant admitted them, showed them a room and gave them a key. The couple remained in the hotel until about ten o'clock the next morning, when Verbie left, saying he was going for their trunk which was coming from Michigan. About three o'clock in the afternoon of the same day, defendant gave Anna Villanova a newspaper to read and on examining it the latter made some exclamation to the effect that her brother was looking for her. Defendant

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
vs.	Ebbe, Defendant in Error,
ANDY STRAWHUN, Plaintiff in Error.	

32710.020

MR. MORRISON DELIVERING OPINION

DELIVERED THE OPINION OF THE COURT:

Defendant, upon trial by the court, was found guilty of encouraging Anna Villanova, under the age of eighteen years, to become a delinquent child, and was sentenced to imprisonment in the house of correction of Cook county for the term of six months, and also to pay a fine of $100.

We are not satisfied to let this judgment stand. Incompetent evidence was heard and the evidence is not convincing beyond a reasonable doubt as to defendant's guilt.

Defendant came [illegible] a small house of ill [illegible] terms at 3109 Dearborn avenue, Chicago; the rooms are rented monthly to women employed in the nearby factories; occasionally the rooms are rented to married couples. About [illegible] in the morning of May 16, 1920, Anna Villanova [illegible] Verbie rang the door bell of defendant's [illegible], [illegible] sent forward. The man indicated to her to [illegible] for that he and his wife had just come from [illegible] room. Defendant [illegible] Anna [illegible] key. The couple remained in the hotel until about [illegible] the next morning, when Verbie left, [illegible] time which was coming from [illegible]. About [illegible] afternoon of the same day, defendant gave Anna Villanova [illegible] paper to read and on examining it the [illegible] to the effect that her employer was looking for her. Defendant

testified that she then learned for the first time that the couple was not husband and wife. She remonstrated with Anna Villanova and asked her why she had told her that they had come from Michigan; the girl then told defendant where she lived and said that she had been away from her home since May 13th. Defendant thereupon ordered her to leave the hotel.

Some of the boarders at the hotel testified. One of them said he had lived there for a year previous to the occurrence in question; that it was a rooming house and occupied mostly by men; that once in awhile there would be a man and his wife; that most of the men are employed at the shops of the International Harvester Company; that during the time he had lived there he had never seen any women coming to the hotel with men other than those that were married. Another witness had lived there for nearly two years and testified to the same effect.

The trial court admitted, over objection, the testimony of a police officer repeating a statement claimed to have been made by Anna Villanova in the presence of defendant. This accusation the defendant denied. Such evidence was inadmissible. People v. Harrison, 261 Ill. 517; People v. Ritti, 312 Ill. 73. The same police officer was, over objection, permitted to testify that the defendant had been arrested before this occasion and charged with pandering. This was reversible error. People v. Reed, 287 Ill. 606. This case also holds that in a criminal case tried by the court "there is no course of sound reasoning justifying a conclusion that a court considering evidence competent and relevant as tending to prove the issue when ruling on the admission of testimony, regards it as incompetent and not tending to prove the issue when finding the fact." There is nothing in the instant record indicating that the court disregarded this incompetent evidence in arriving at its conclusion.

testified that she then learned for the first time that the people was not husband and wife. She remonstrated with Anna Williams and asked her why she had told her that they had come from Michigan; the girl then told defendant where she lived and said that she had been away from her home since May 1st. Defendant thereupon ordered her to leave the hotel.

None of the boarders at the hotel testified. One of them said he had lived there for a year previous to the transaction in question; that it was a rooming house and occupied mostly by men; that once in awhile there would be a man and his wife; that most of the men were employed at the shops of the International Harvester Company; that during the time he had lived there he had never seen any women coming to the hotel with men other than those that were married. Another witness had lived in Joliet for twenty years and testified to the same effect.

The trial court sustained, over objection, the testimony of a police officer recounting a statement claimed to have been made by Anna Williams in the presence of defendant. This, notwithstanding the defendant denied. Such evidence was inadmissible. People v. Herring, 201 Ill. 327; People v. Hall, 71 Ill. 74. The same police officer was, over objection, permitted to testify that the defendant had been arrested before, in company and charged with cohabiting. This was contradictory error. People v. Head, 257 Ill. 464. This case also holds that a criminal case tried by the court where [illegible] and [illegible] finding just ing a conclusion that a court [illegible] evidence [illegible] relevant as tending to prove the issue [illegible] admission of testimony, regardless of [illegible] to prove the issue when [illegible]." [illegible] the instant record indicating that [illegible] incompetent evidence in arriving at its conclusion.

We are not convinced that Anna Villanova told the truth. Her testimony in many respects is contradictory. At one time she said that Verbie stayed with her at defendant's house until the following morning; at another time that he stayed only ten minutes. She also testified that defendant sent four other men to her room on the 16th of May, with whom she had intercourse, receiving from each of them $2, one-half of which she gave to defendant. This was denied by defendant. In view of the questionable character of the complaining witness, we are not disposed to place much credence in her testimony. The facts tending to sustain the charges against the defendant rest on her testimony alone, and in view of the definite denial by defendant we cannot say that they are sufficiently proved.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

We are not convinced that some witnesses told the truth. Her testimony in many respects is unintelligible. At one time she said that Verbit always gave him at defendant's house until the following morning; at another time she said it was only ten minutes. She also testified that defendant went upstairs to her room on the 12th of May, with some six and twenty-three, receiving from each of them $2, approximately at which time he departed. This was denied by the defendant. In view of the contradictory character of the conflicting witness, we are not disposed to place much credence in her testimony. The jury seemed to make this charge against the defendant rest on the testimony of, and in view of the difficulty in doing so, we cannot say that they are sufficiently proved.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Rathbun and O'Connor, J.J., concur.

33773

R. L. LEVIN & CO., a Corporation,
Appellee,

vs.

WADSWORTH V. HOLMES,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 620

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of a promissory note containing a power of attorney to confess judgment, had judgment entered by confession for $397.50, of which $60 was for attorney's fees. Defendant moved to vacate the judgment, which motion was denied and he appeals.

It is first contended that the instrument is non-negotiable in that it does not contain an unconditional promise to pay a sum certain in money. The instrument contains a "schedule and date of payments." The schedule commences:

"1 Month after date.....$8.07
2 Months after date.....22.50"

and continues at the rate of $22.50 a month to and including the words "12 Months after date.....22.50." Then follow the words:

"$22.50 until paid
Time Payment Plan

$480.57 Chicago, Illinois, May 3, 1928.

At the time or times stated in the schedule of payments herein, after date, I or We promise to pay to the order of Schmidt Construction Co. at their office or other place designated by notice, the sums of money stated in said schedule of payments aggregating in amount Four Hundred Eighty and 57/100 Dollars for value received, with interest at six per cent per annum after date due on the aggregate amount of this note remaining unpaid."

We do not agree with the contention that the amount which the maker of the note agreed to pay was uncertain and indefinite The Negotiable Instruments Act, paragraph 22, ch. 98, Cahill, provides that "the sum payable is a sum certain within the meaning of

33773

B. L. DAVIS & CO., a corporation,
Appellee,

vs.

MONMOUTH V. [illegible],
Appellant.

SPECIAL CON

Mr. [illegible] delivered the opinion of the court.

Plaintiff, as assignee of a promissory note containing a power of attorney to confess judgment, had judgment entered by confession for $337.80, of which $30 was for attorney's fees. Defendant moved to vacate the judgment, which motion was denied and he appeals.

It is first contended that the instrument is non-negotiable in that it does not [illegible] unconditional promise to pay a certain sum of money. The instrument contains a "maturity and date of payments." The relevant [illegible] read:

"1 month after date.....
2 months after date.....

and continues [illegible] "12 months after date....."

"$30.00 until paid
Time Payment Plan

Jan. 27 [illegible], Illinois, [illegible]

As the time of [illegible] is not certain in the sense of requiring payment after date, I do not [illegible] the [illegible] Association Co. [illegible] motion, the [illegible] sustaining the demurrer [illegible] for value received [illegible] after date [illegible] unpaid."

We do not agree [illegible]

which the maker of the note agreed [illegible] the Negotiable Instruments Act, [illegible] provides that "the sum payable is a sum certain [illegible]

this Act, although it is to be paid: *** 2. By stated installments; or 3. By stated installments, with a provision that upon default in payment of any installment, or of interest the whole shall become due." Anyone reading this instrument would understand without difficulty that the obligation was to pay $480.57 in monthly installments; that one month after date, $8.67 would be due and thereafter an instalment of $22.50 would fall due each month until the principal amount of $480.57, was paid. This is the plain meaning of the instrument and while words might have been used to make it more definite and explicit, yet the failure to use such words does not necessarily make the amount of the obligation uncertain and indefinite.

It is next said that the note is non-negotiable because it authorizes a confession of judgment with costs and attorneys' fees at any time after the execution thereof, whereas the statute, paragraph 22, allows such costs and attorneys' fees "in case payment shall not be made at maturity." Paragraph 25 says the negotiable character of an instrument is not affected by a provision which authorizes a confession of judgment. The instrument contains the provision that:

> "In case of default in the payment of any installment, or any interest or any sum of money which may be due hereon, the aggregate amount of this note remaining unpaid, and every installment thereof shall without notice or demand at once become due and payable, together with interest after default at the highest legal contract rate, exchange and all collection charges, including attorney's fees. And to secure the payment hereof, any attorney at law is hereby authorized to enter the appearance of the undersigned, in any court of record, at any time after the execution hereof," and to confess judgment for any amount unpaid including attorney's fees.

When the maker of the note defaulted in an instalment, the whole amount of the note became due. Before that time the stipulation with reference to the power to confess judgment with an attorney's fee was entirely inoperative. The amount to be paid was certain during the currency of the note as a negotiable instrument, and it only became uncertain after it ceased to be negotiable

this act, although it is to be paid. [illegible] or 3. by stated instalments, with a provision that upon default in payment of any instalment, or of interest, the whole shall become due." Argument really this instrument makes ordinary and strong similarity that the obligation [illegible] $2,87 is monthly instalments; that one month after that $2,87 would be due and payable; that an instalment of $20.00 would be due each month until the principal amount of $[illegible], was paid. This is the plain meaning of the structure and while words might have been used to make it more definite and explicit, yet the failure to use such words does not necessarily make the amount in the obligation uncertain and indefinite.

It is next said that the note is non-negotiable because it authorizes a confession of judgment with costs and attorney's fees at any time after the execution thereof. Section [illegible] paragraph 27, allows such clause and stipulation for "a sum agreed upon shall not be made at maturity." Subsection [illegible] says the negotiable character of an instrument is not affected by a provision which authorizes a confession of judgment. The instrument contains the provision that:

> "In case of default in the payment of any [illegible] and, or any interest or any part of any [illegible] the [illegible] the principal amount of this note remaining unpaid, and any [illegible] thereof shall at our option become immediately due and payable, together with interest [illegible] at the highest legal contract rate, costs and all collection [illegible], including attorney's fees. And to secure the payment [illegible] authority at law in writing and [illegible] to enter the [illegible] in any court of record, at any time after the execution hereof," and be [illegible] for any amount [illegible] including attorney's fees.

When the maker of the note [illegible] in an instrument, the whole amount of the note [illegible] the stipulation with reference to the [illegible] an attorney's fee was entirely [illegible] was certain during the currency of the [illegible] ment, and is only payable in certain [illegible]

by the default of the maker in its payment. We can perceive no pertinent difference between an amount which has matured by the expiration of the time limit contained in an instrument and an amount which has been declared due because of default in interest or for non-payment of an instalment. There is no reason in justice why in the latter case the creditor should incur the expense of the collection of the note and not in the other. In either case the holder of the note should be reimbursed by the debtor, by whose default suit was rendered necessary and the expenses entailed. This is in accord with Hutson v. Rankin, 213 Pac. (Idaho) 345, where the court said:

> "The rule is well settled, by the great weight of authority, that a provision in a note that the whole shall be due, either absolutely or at the option of the holder, on default in the payment of interest, or in the payment of any instalment does not affect its negotiability."

See also Dorsey v. Wolff, 142 Ill. 589; Gehlbach v. The Carlinville National Bank, 83 Ill. App. 129.

What we have heretofore said meets the point that the obligation mentioned in the instrument is not payable at a determinable future time. The obligation to pay $22.50 each month until the principal amount of $480.57 is paid is definite as to a "determinable future time."

The negotiability of the instrument is further attacked on the ground that it contains a provision not only for the payment of money but is also coupled with other stipulations between the parties. The note recites that it is given in payment of the balance due for paving an alley abutting certain property in Chicago; that the contract for this labor and material was satisfactorily completed; that by the acceptance of the note the payee did not waive his lien upon the premises and that nothing except full payment with costs and expenses should satisfy said lien. These stipulations relate to the transaction out of which the indebtedness arose, and

by the default of the maker in the payment. To say perceive no particular difference between an amount which has matured by the expiration of the time limit contained in an instrument and an amount which has been declared due because of default in interest or for non-payment of an instalment. There is no reason in justice why in the latter case the creditor should share the expense of the collection of the note and not in the other. In either case the balance of the note should be reclaimed by the maker, by whose default suit was rendered necessary and the expense incurred. This is in accord with Watson v. Jarvis, [illegible] (Ident) 142, where the court said:

> "The rule is well settled, by the great weight of authority, that a provision in a note that the whole shall be due, upon absolutely or at the option of the holder, on default in the payment of interest, or in the payment of any instalment does not affect its negotiability."

See also Dorsey v. Smith, 181 Ill. 94; Williams v. The Guaranty Building Loan Association, 20 Ill. App. 129.

What we have particularly said seems the point that the obligation mentioned in the instrument is not payable at a definite future time. The obligation to pay the principal sum with the principal amount of interest is not is definite as to a "determinable future time."

The negotiability of the instrument in question depends on the ground that it contains a stipulation [illegible] the payment of money but is also coupled with other [illegible] promises. The note recites [illegible] it is here in question [illegible] made for varying amounts [illegible] that the contract for this loan and mortgage was [illegible] completed; that by the acceptance [illegible] waive its lien upon the premises [illegible] with costs and expenses should [illegible] lien. [illegible] relate to the transaction out of which the instrument arose, [illegible]

the statute, paragraph 23, expressly provides that the negotiability of an instrument is not affected by the recital therein of the transaction giving rise to the indebtedness. Metcalf v. Draper, 98 Ill. App. 399; Doyle v. Considine, 195 Ill. App. 311.

Other points are made which it is not necessary to notice, for they rest upon the presumption that the instrument is not negotiable. We hold to the contrary, and that the motion to vacate the judgment was properly denied.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

the circuits, charges R 2A, necessarily proves the unreliability of an instrument in no sense affected by the results therein, the trans-motion giving rise to the instrumentation. Kuhnell v. Crane, 17 Ind. App. 488; Davis v. Appleton, 126 Ill. App. 626.

Other points are made which it is unnecessary to notice, for they rest upon the proposition that the instrument is not reliable. To hold to the contrary, as that it ought to be when the judgment was properly issued.

The judgment is affirmed.

Affirmed.

Matchett and O'Connor, JJ., concur.

33583

ELIZABETH KELLUM,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case and on trial by jury a verdict for plaintiff in the sum of $5500 was returned, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

Defendant seeks to reverse, contending that the court erred in refusing to direct a verdict for the defendant, and insisting that the verdict is against the manifest weight of the evidence; that the damages awarded are excessive and that the court erred in its ruling on the admission of evidence and in the giving of instructions.

The evidence for plaintiff tends to show that on August 11, 1926, while she was a passenger on one of defendant's cars, which was moving in a northerly direction on Clark street in Chicago, plaintiff was injured as the result of a collision of the car in which she was riding with a motor vehicle owned by one Levy. The evidence also tends to show that the collision was sudden; that the car did not change the speed at which it was going prior to the collision; that it was running, as one witness said, "pretty fast," and that there was a great noise at the time the car and motor vehicle came together.

Plaintiff sued the street car company and the owner of the truck jointly, but the jury returned a verdict of not guilty as to the owner of the truck.

Defendant (wisely, as we think) offered no evidence

22202

MILLAMENTH KLEBUN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2 Ill. App. 630

MR. JUSTICE ARCHBALD DELIVERED THE OPINION OF THE COURT.

In an action on the case and on trial by jury a verdict for plaintiff in the sum of $2500 was returned, upon which the court, overruling motions for a new trial and in arrest, entered judgment.

Defendant seeks to reverse, contending, that the court erred in refusing to direct a verdict for the defendant, and insisting that the verdict is against the manifest weight of the evidence; that the damages awarded are excessive and that the court erred in its ruling on the admission of evidence and in the giving of instructions.

The evidence for plaintiff tends to show that on August 11, 1899, while she was a passenger on one of defendant's cars, which was moving in a northerly direction on Clark street in Chicago, plaintiff was injured on the occasion of a collision of the car in which she was riding with a motor vehicle owned by one Levy. The evidence also tends to show that the collision was sudden; that the car did not change the speed at which it was going prior to the collision; that it was running, as one witness said, "pretty fast," and that there was a great noise at the time the car and motor vehicle came together.

Plaintiff used the street car company and the owner of the truck jointly, but the jury returned a verdict of not guilty as to the owner of the truck.

Defendant (wisely, as we think) offered no evidence

The evidence submitted by plaintiff tended to show that she was injured without negligence on her part and as a result of the negligence of one or both of the defendants, but it did not definitely disclose which defendant was at fault. The circumstances just before and at the time of the accident were not presented to the jury. They should have been developed on the trial.

Plaintiff contends here (although such theory was disclaimed in the trial court) that the doctrine of res ipsa loquitur is applicable, citing Chicago Union Traction Co. v. Mes, 136 Ill. App. 98, and Barnes v. Danville St. Ry. Co., 235 Ill. 566. These cases do not sustain this contention. That doctrine is not applicable to this case. The verdict is against the manifest weight of the evidence.

Moreover, the court at the request of plaintiff gave an instruction which has been held reversibly erroneous in the recent case of Molloy v. Chicago Rapid Transit Co., 335 Ill. 164.

For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

The evidence submitted by plaintiff tended to show that she was injured without negligence on her part and as a result of the negligence of one or both of the defendants, but it did not definitely disclose which defendant was at fault. The circumstances just before and at the time of the accident were not presented to the jury. They should have been developed on the trial.

Plaintiff contends here (although her theory was disclaimed in the trial court) that the doctrine of res ipsa loquitur is applicable, citing: Illinois Union Traction Co. v. Ann, 136 Ill. App. 59, and Barnes v. Danville St. Ry. Co., 246 Ill. 555. These cases do not contain this contention. That doctrine is not applicable in this case. The verdict is against the manifest weight of the evidence.

Moreover, the court at the request of plaintiff gave an instruction which has been held reversibly erroneous in the recent case of Kelley v. Illinois Bell Telephone Co., 358 Ill. 158. For the reasons indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McGlynn, P. J., and Dunn, J., concur.

33586

ALBERT BARTOLAI,
Appellee,

vs.

THE WILLETT COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

255 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants, The Willett Company and J. Michaels, alleging that he was injured as a result of their joint negligence. There was a trial by jury and a verdict for plaintiff, and damages were assessed against The Willett Company for $1500 and against Michaels for $750. Plaintiff then dismissed as to Michaels, and the court, overruling motions of defendant Willett Company for a new trial and in arrest, entered judgment on the verdict.

It is urged that the jury was without power to apportion the damages by its verdict, but the liability was joint and several, and plaintiff under the practice in this state could dismiss as to any defendant before judgment. Lasley v. Crawford, 228 Ill. App. 590; Nordhaus v. Vandalia R. R. Co., 242 Ill. 166.

It is next urged that the averments of the declaration contained no allegation as to the nature or extent of plaintiff's injury at the time the case was submitted to the jury.

The original declaration consisted of four counts. The fourth alone averred the extent of plaintiff's injuries. The first specifically adopted the allegations of the fourth count in this respect. The fourth count was withdrawn before the case was submitted to the jury, but this did not withdraw the statements therein adopted by reference in the first count. Day v. Clarke, 1 A. K. Marshall (Ken.), p. 521.

ALBERT MARTOCAL,
Appellee,

vs.

THE WILLETT COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants, the Willett Company and J. Kimmels, alleging that he was injured as a result of their joint negligence. There was a verdict by jury and a verdict for plaintiff, and damages were assessed against the Willett Company for $1500 and against Kimmels for $750. Plaintiff then dismissed as to Kimmels, and the court, overruling motions of defendant Willett Company for a new trial and in arrest, entered judgment on the verdict.

It is argued that the jury was without power to apportion the damages by the verdict, but the liability was joint and several, and plaintiff under the circumstances in this case could dismiss as to any defendant before judgment. Lesnik v. Gravlyck, 324 Ill. App. 480; Williams v. Vandalia R. R. Co., 241 Ill. 168.

It is next urged that the evidence of the defendants contained no allegation as to the nature or cause of plaintiff's injury at the time the case was submitted to the jury.

The original declaration contained [illegible] counts. The fourth alone charged the act of plaintiff's injury. The first specifically adopted the allegations of the fourth count in this respect. The fourth count was stricken before the case was submitted to the jury, but this did not eliminate the statements therein adopted by reference in the first count. Ill. P. Clarke, 1 A. R. Kaufman (Adm.), p. 321.

It is next urged that the court erred in giving the only instruction requested by plaintiff, which was as follows:

> "You are instructed that if you find that the plaintiff has proved by a preponderance or greater weight of the evidence that the defendants were guilty of the negligence alleged against them in plaintiff's declaration or and that as a proximate result of such negligence, if any, the plaintiff sustained damages and that the plaintiff was, at and before the time of the accident in question, exercising ordinary care for his own safety, then you shall find the defendants guilty."

It is argued that this instruction was bad because it was in its nature peremptory and because it referred the jury to the declaration for a determination of the negligence alleged therein. Krieger v. A. E. & C. R. R. Co., 242 Ill. 544; Bernier v. Ill. Cent. R. R. Co., 296 Ill. 464; Lerette v. Director General, etc., 306 Ill. 348; Kehr v. Snow & Palmer Co., 225 Ill. App. 403; Westbrook v. C. & N. W. Ry. Co., 248 Ill. App. 446. Although plaintiff contends to the contrary, we think the instruction was peremptory in its nature and does not, as do the instructions considered in the Bernier and Westbrook cases, relate solely to the question of damages.

In Kehr v. Snow & Palmer Co., the Appellate court for the Third district considered an instruction which stated:

> "The court instructs the jury that it is not necessary for the plaintiff to prove by a preponderance of the evidence the facts set out in every count of the declaration, but that the plaintiff is entitled to recover if she proves by a preponderance of the evidence the allegations contained in any one count thereof."

After citing Krieger v. A. E. C. R. R. Co., and Bernier v. Ill. Cent. R. R. Co., supra, the court said:

> "In the present case the court did not inform the jury as to what facts were alleged in the declaration and the instruction was particularly faulty, owing to the fact that a demurrer had been sustained to two counts."

The judgment was reversed for this and other errors set forth in the opinion, which does not state whether the instruction alone would have compelled a reversal.

In Krieger v. A. E. C. R. R. Co., supra, the instruc-

It is next urged that the court erred in giving the only instruction requested by plaintiff, which was as follows:

> "You are instructed that if you find that the plaintiff has proved by a preponderance or greater weight of the evidence that the defendants were guilty of the negligence alleged against them in plaintiff's declaration or and that as a proximate result of such negligence, if any, the plaintiff sustained damage and that the plaintiff was, at and before the time of the accident in question, exercising ordinary care for his own safety, then you shall find the defendants guilty."

It is argued that this instruction was bad because it was in its nature peremptory and because it referred the jury to the declaration for a determination of the negligence alleged therein. Krieger v. A. B. & C. R. R. Co., 245 Ill. 344; Bartlett v. Ill. Cent. R. R. Co., 266 Ill. 464; Lemmon v. Director General, etc., 308 Ill. 367; Kehr v. Moen & Palmer Co., 228 Ill. App. 4 5; Peabody v. C. & A. R. Co., 148 Ill. App. 446. Although plaintiff contends to the contrary, we think the instruction was peremptory in its nature and does not, as the instructions considered in the Kertner and Weatbrook cases, relate solely to the question of damages.

In Kehr v. Moen & Palmer Co., the Appellate Court for the Third District considered an instruction which stated:

> "The court instructs the jury that it is not necessary for the plaintiff to prove by a preponderance of the evidence the facts set out in every count of the declaration, but that the plaintiff is entitled to recover if she proves by a preponderance of the evidence the allegations contained in any one count thereof."

After citing Krieger v. A. B. & C. R. R. Co., and Lemmon v. Ill. Cent. R. R. Co., supra, the court said:

> "In the present case the court in not giving the jury as to what facts were alleged in the declaration and the instruction was particularly fatal, because the first count of the declaration had been abandoned in two counts."

The judgment was reversed for this and other errors set forth in the opinion, which held, of course, that the instruction alone would have compelled a reversal.

In Krieger v. A. B. & C. R. R. Co., supra, the instruc-

tion complained of was:

> "The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff has proved his case as laid in his declaration, then you will find the issues for the plaintiff."

The opinion there discussed quite at length the history of instructions given by the courts of this state wherein the jury was referred to the declaration for a statement of the issues. It there appeared that the allegation of the declaration as to the exercise of due care and caution by the plaintiff was defective. The court said that an instruction should not limit the exercise of care and caution of the party injured to the time when he was in danger, regardless of his conduct in putting himself in that position, and after citing authorities to that effect further stated:

> "It will be seen from the decisions referred to that if it is proper to give the instruction at all, it can only be justified where the declaration is a complete statement of a cause of action. As the instruction directed a verdict for the plaintiff if he had proved the facts alleged in his declaration, it could not be cured by other instructions."

In Lerette v. Director General, etc., the language of the opinion indicates that a somewhat similar instruction was offered, but the defendant having requested a similar instruction, the same was held in that case not to be reversible.

There is no suggestion in this case that there was any defect in the declaration, nor does it appear that the declaration itself ever came into the hands of the jury. While it is undoubtedly the better practice that an instruction of the court should state in plain and simple language what the issues are as made by the pleadings, we think it would be hypercritical to hold that under facts such as appear in this record the giving of this instruction was prejudicial. In our opinion it was far less so than are instructions which copy the allegations of the declaration quite at length, thus giving to them the apparent approval

tion complained of was:

> "The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff has proved his case as laid in his declaration, then you will find the issues for the plaintiff."

The opinion there discussed quite at length the history of instructions given by the courts of this state where the jury was referred to the declaration for a statement of the issues. It there appeared that the allegation of the declaration as to the exercise of due care and caution by the plaintiff was defective. The court held that an instruction should not limit the exercise of care and caution of the injured to the time when he was in "danger", regardless of his conduct in putting himself in that position, and after citing authorities to that effect further stated:

> "It will be seen from the decisions referred to that if it is proper to give the instruction at all, it can only be justified where the declaration is a complete statement of a cause of action. As the instruction directed a verdict for the plaintiff if he had proved the facts alleged in his declaration, it could not be cured by other instructions."

In Lawrence v. Chicago Railway Co., the language of the opinion indicates that a somewhat similar instruction was offered, but the defendants having withdrawn it at the trial, the case was held in that case not to be reversible.

There is no suggestion in this case that there was any defect in the declaration, nor does it appear that the instruction itself ever came into the hands of the jury. While it is undoubtedly the better practice to limit, by instruction, the court should state in plain and simple language that the issues are as made by the pleadings, we think it would be inconsistent to say that under facts such as appear in this record the giving of this instruction was prejudicial. In our opinion it was for lack of a than are instructions which copy the allegations of the declaration quite at length, thus giving to them the prominent mention

of the court.

It is also urged that the verdict is contrary to the manifest weight of the evidence and should have been set aside for that reason.

The accident in which plaintiff was injured occurred November 4, 1926, at or near the intersection of Des Plaines street, a public highway extending north and south, and Randolph street, another public highway extending east and west. Plaintiff testified that about a quarter after seven of the morning in question he got off an east-bound Lake street car at Union street and walked over to the north side of Randolph street and then to DesPlaines street, crossing over to the northeast corner of the street to get a cup of coffee; that before he went over to the sidewalk he looked on both sides, which were clear, and that he was walking on the sidewalk when he was suddenly struck by a truck which ran over his right leg; that he did not see the truck before it hit him but that the truck was going north.

Frank Wineberg, the driver of the truck owned by defendant Michaels, said that he was driving a two and a half ton truck at the time in question north on DesPlaines street, and saw the plaintiff crossing the street and slackened his speed; that the Willett trailer was alongside of him when he got to the corner; that it went a little past him and then pulled out and that the rear wheel of the Willett trailer caught his left front wheel, knocking it out of control and forcing the truck on the sidewalk, where it hit the plaintiff; that as they drove along together the Willett truck was about a foot to his left; that he was driving within one foot of the Willett truck when he saw plaintiff crossing; that there was no room to his left, as by turning in that direction he would hit the Willetttruck; that his truck was alongside of the Willett truck from Washington street to

of the court.

It is also urged that the verdict is contrary to the manifest weight of the evidence and should have been set aside for that reason.

The accident in which plaintiff was injured occurred November 4, 1936, at or near the intersection of Des Plaines street, a public highway extending north and south, and Randolph street, another public highway extending east and west. Plaintiff testified that about a quarter after seven of the morning in question he got off an east-bound Lake street car at Union street and walked over to the north side of Randolph street and then to Desplaines street, crossing over to the northeast corner of the street to get a cup of coffee; that before he went over to the sidewalk he looked on both sides, which were clear, and that he was walking on the sidewalk when he was suddenly struck by a truck which ran over his right leg; that he did not see the truck before it hit him but that the truck was going north.

Frank Wimberg, the driver of the truck owned by defendant Mikaelis, said that he was driving a two and a half ton truck at the time in question north on Desplaines street, and saw the plaintiff crossing the street and slackened his speed; that the Willett trailer was alongside of him when he got to the corner; that it went a little past him and then pulled out and that the rear wheel of the Willett trailer caught his left front wheel, knocking it out of control and forcing the truck on the sidewalk, where it hit the plaintiff; that as they drove along together the Willett truck was about a foot to his left; that he was driving within one foot of the Willett truck when he saw plaintiff crossing; that there was no room to his left, as by turning in that direction he would hit the Willett truck; that his truck was alongside of the Willett truck from Washington street to

Randolph street, about a full block; that when he saw plaintiff coming the Willett truck, instead of slackening speed, as he, the witness, did, kept on going, forcing the accident.

The driver of the Willett company truck, Alfred Junquera, testified for defendant to the effect that he was driving in the northbound car track on DesPlaines street at the time in question; that his wheels were directly in the tracks; that Michaels' truck was about three feet from his truck and had been so for about three-quarters of a block; that they were both traveling at the same rate of speed, the truck the witness was driving being a little ahead of the other; that when they approached the other side of Randolph street plaintiff started coming close and the witness saw that he was going to turn into the car line; that he blew his horn and turning his head around noticed Michaels' truck climbing the sidewalk. He says that he went about 100 feet more, pulled over to one side and came back as the driver of Michaels' truck was backing off the sidewalk; that he was 8 or 9 feet north of the corner when he blew his horn; that he did not at any time strike the truck; that he didn't feel any jar at all, and that there wasn't any damage to his truck; that he had at no time prior to the happening of the accident turned his truck to the right; that he remained in the street car tracks all the time.

One Frank Schnell, who also drove a truck for The Willett company, testified that he was in the neighborhood of DesPlaines and Randolph streets at the time in question, driving another truck of The Willett company north about 30 feet ahead of Junquera; that the trucks did not come in contact and that Junquera did not run into Michaels' truck.

Under all the evidence we think the question of defendant's negligence was for the jury. Indeed, the testimony

Randolph street, about a full block; just were he saw plaintiff coming the Willard truck, instead of diminishing speed, he, the witness, did, just as quick, forward his motion.

The driver of the Willard company's truck, hired Dunquerk, testified for defendant; he has stated that he was driving in the north and east truck on [illegible] street at the time in question; that six weeks were already in the street; that plaintiff's truck was about [illegible] from the street and had been so for about three-quarters of a block; that they were both travelling at the same rate of speed, the truck the witness was driving being a little ahead of the other; that when they approached the other side of [illegible] street plaintiff started coming, alone the witness saw that he was going to turn into the car line; that he gave [illegible] and turning his head around looked towards plaintiff's [illegible] alongside. He saw that he was right in front [illegible] over to one side and came back as the driver of plaintiff's [illegible] was backing off the sidewalk; that he was 8 or 9 feet [illegible] the corner when he blew his horn; that he did not see any [illegible] strike the truck; that he didn't know any [illegible] at all, and that there wasn't any damage to his truck; that he [illegible] prior to the happening of the accident turned his truck [illegible] right; that he remained in the street [illegible] .

[illegible]

Willard company, testified that he was in the employment of Dunquerque and Randolph streets on [illegible] morning, [illegible] another truck of the Willard company [illegible] of witnesses; that the trucks did not come [illegible] Dunquerque [illegible] not run into plaintiff's [illegible] .

Under all the evidence [illegible] defendant's negligence was for the jury. Indeed, [illegible]

of Junquera and Schnell seems hardly consistent with the conceded fact that after driving ahead some two hundred feet Junquera returned to the scene of the accident. The jury and the trial Judge saw and heard the witnesses, and we do not disagree with their determination of the facts at issue.

It is also urged that the verdict is excessive. The evidence tends to show that after the injury plaintiff was taken to a hospital; that he had a cut above the right eye about 4 or 5 inches long, a bruise and a cut on both hands; that the right leg was swollen and that there were black and blue contusions on it. The treatment given was rest in bed and hot applications of boracic acid. A surgeon put from 5 to 7 stitches in the bruise above plaintiff's right eye and covered it with a bandage, and both hands were dressed with antiseptic bandages. He remained at the hospital two or three days, when he was taken home. His physician continued in attendance, making about 24 visits. Plaintiff was confined to his bed for three weeks and did not return to his work for about one week thereafter. He was earning $75 a week in his employment and did not receive any salary for four weeks. His bill for medical services was $150 and he lost $300 through his inability to work. Unliquidated damages of this sort are necessarily more or less matters of opinion. We do not think amount given calls for interference with the verdict of the jury.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

of Jungmore and Kalmoff seems hardly consistent with the concerted fact that after driving about some two hundred feet Jungmore returned to the scene of the accident. The jury and the trial judge saw and heard the witnesses, and we do not disagree with their determination of the facts as I have.

It is also urged that the verdict is excessive. The evidence tends to show that after the injury plaintiff was taken to a hospital; that he had a cut above the right eye about 4 or 5 inches long, a bruise and a cut on both hands; that the right leg was swollen and that there were black and blue contusions on it. The treatment given was rest in bed and hot applications of boracic acid. A surgeon put from 4 to 7 stitches in the bruise above plaintiff's right eye and covered it with a bandage, and both hands were dressed with antiseptic bandages. He remained at the hospital two or three days, when he was taken home. His physician continued in attendance, making about 24 visits.

Plaintiff was confined to his bed for three weeks and did not return to his work for about one week thereafter. He was earning $75 a week in his employment and did not receive any salary for four weeks. His bill for medical services was $150 and he lost $300 during his inability to work. Unjustified damages of this sort are necessarily more or less matters of opinion. We do not think amount given calls for interference with the verdict of the jury.

The judgment is affirmed.

AFFIRMED.

McCurdy, P. J., and Clem, J., concur.

33616

RAYMOND MOORE,
Appellee,

vs.

MARGARET D. BLISS and
JAY P. BLISS,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

255 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 11, 1929, plaintiff, Raymond Moore, caused a confession of judgment to be entered against Margaret D. Bliss and Jay P. Bliss for the sum of $4156. Attached to the declaration were 17 notes for the sum of $150 each, dated July 16, 1926, signed by the defendants, payable to the bearer and due consecutively from 14 to 30 months after date, each note bearing interest at the rate of 7% per annum, payable monthly and containing power to confess judgment.

On February 25th thereafter the defendants filed a petition by which they prayed that said judgment might "be vacated, cancelled and annulled and said cause of action dismissed and that your petitioners may have such other and further relief as the law may require and to the court may seem meet."

The petition averred that in the year 1926 defendants borrowed from the Central Manufacturing District Bank, a banking corporation of the City of Chicago, the sum of $3600; that they entered into an usurious agreement with said bank to pay them a rate of interest in excess of 20% per annum; that in consideration of this usurious loan they executed and delivered to the bank 30 promissory notes for the sum of $150 each, bearing interest at 7%, payable monthly in consecutive order; that the sole consideration for the execution and delivery of the said notes was this usurious loan of $3600.00.

33616

RAYMOND MOORE,
Appellee,

vs.

MARGARET D. BILES and
JAY P. BILES,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MACHRATT DELIVERED THE OPINION OF THE COURT.

On February 11, 1920, plaintiff, Raymond Moore, caused a confession of judgment to be entered against Margaret D. Biles and Jay P. Biles for the sum of $4150. Attached to the declaration were 17 notes for the sum of $150 each, dated July 16, 1920, signed by the defendants, payable to the order and due consecutively from 14 to 30 months after date, each note bearing interest at the rate of 7% per annum, payable monthly and containing power to confess judgment.

On February 25th thereafter the defendants filed a petition by which they prayed that said judgment might be vacated, cancelled and annulled and that cause of action dismissed and that your petitioners may have such other and further relief as the law may require and to the court may seem just."

The petition averred that in the year 1916 defendants borrowed from the Central Manufacturing District Co., a banking corporation of the city of Chicago, the sum of $5000; that they entered into an usurious agreement with said bank to pay them a rate of interest in excess of 7% per annum; that in consideration of this usurious loan they executed and delivered to the bank 30 promissory notes for the sum of $150 each, bearing interest at 7%, payable monthly in successive order; that the note collateral for the execution and delivery of the said notes was this usurious loan of $5000.00.

The petition further averred that Raymond Moore, the plaintiff, was an officer and employee of said bank, and that at all times since the usurious loan was made plaintiff had full knowledge of all the facts in relation thereto and full knowledge that the said loan was usurious; that Moore claimed to be the owner of said notes, which were transferred to him subsequent to the execution and delivery of the same by defendants; that defendants charged upon information and belief that plaintiff was a mere dummy, acting for and in behalf of his employer, the bank, and had no real interest in the notes; further, that the judgment rendered herein was based upon some of the said notes so executed and delivered.

The petition further averred that defendants have paid, either to the bank or Moore on said usurious loan, the sum of $1220; that in the month of September, 1927, Moore, claiming to be the owner of certain of these notes, caused a judgment to be confessed thereon in the Municipal court of Chicago for the sum of $999; that the sum of $1220 (the said sum of $999 with interest thereon at 7% being deducted from the original usurious loan of $3600) showed a balance of only $1320 still owing by defendants to the holder of the notes; and that defendants were in no event indebted to plaintiff for more than that amount; that, moreover, defendants tendered to Moore the sum of $2300 in addition to the amount already paid on said loan, in full settlement and discharge of the same, which plaintiff refused to receive.

After a consideration of the petition the court, upon motion of plaintiff, reduced the judgment entered in the amount of $900 on account of the judgment theretofore entered in the Municipal court on a part of the notes, but denied the motion and prayer of the petition. From that order the defendants prosecute this appeal.

The petition further recited that Lamount, since the plaintiff, was an officer and employee of said bank, and that at all times since the execution loan was made plaintiff had full knowledge of all the facts in relation thereto and full knowledge that the said loan was usurious; that Lamont claimed to be the owner of said notes, which were transferred to him subsequent to the execution and delivery of the same by defendants; that defendants charged upon information and belief that plaintiff was a mere dummy, acting for and in behalf of his employer, the bank, and had no real interest in the notes; further, that the judgment rendered herein was based upon some of the said notes so executed and delivered.

The petition further averred that defendants have said, either to the bank or Lamont on all usurious loan, the sum of $320 ; that in the month of September, 1927, Lamont, claiming to be the owner of certain of these notes, caused a judgment to be entered thereon in the municipal court of Detroit for the sum of $320; that the sum of $1000 (the said sum of $1,0 was interest thereon at 7 per cent deducted from the said usurious loan of $6000) caused a judgment to be entered against plaintiff to the holder of the notes; that the defendants were in no event indebted to plaintiff for more than that amount; that, moreover, defendants imposed to secure the sum of $300 in addition to the amount already paid on said loan, in full satisfaction and discharge of the same, which plaintiff refused to remit.

After a consideration of the petition, the motion of plaintiff, reduced the judgment entered in the amount of $300 on account of the judgment rendered in the municipal court on a part of the notes, but is in all other respects the prayer of the petition. Upon that ruling the defendants in error appeal.

Plaintiff contends that the setting aside of a confession of judgment is in the discretion of the court; that the petition should be construed most strongly against the petitioner, and that the petition should state facts, not conclusions - all of which are elementary; but the discretion of the court must be a judicial discretion, and it is not easy to draw the line between statements which are statements of fact and statements which are conclusions of fact. The petition does, however, aver that defendants borrowed $3600; that they gave in the transaction 30 promissory notes for the sum of $150 each, and that the loan was the sole consideration for the execution and delivery of the notes. This, we think, justifies the further conclusion averred that the loan was usurious.

Plaintiff also contends on the authority of DeWitt v. Flint & Walling Mfg. Co., 132 Ill. App. 356, and Murphy v. Schoch, 135 Ill. App. 550, that the court did not err in denying the motion of defendants because it was too broad; that the motion to vacate the judgment should have been denied, since it should have asked only for leave to plead.

The contention is quite technical. Without questioning the authorities cited we think the prayer of the petition here was broad enough to justify an order opening the judgment and allowing the defendants to plead; and under the facts set up in the petition such should have been the order of the court.

For the error indicated the judgment is reversed and the cause remanded with directions to enter such an order.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

Plaintiff contends that the petition, aside of a conclusion of judgment is in the discretion of the court; that the petition should be construed most strongly against the petitioner, and that the petition should state facts, not conclusions - all of which are elementary; but the discretion of the court must be a judicial discretion, and it is not easy to draw the line between statements which are statements of fact and statements which are conclusions of fact. The petition does, however, aver that defendants borrowed $3500; that they gave in the transaction $[illegible] promissory notes for the sum of $1500 each, and that the loan was the sole consideration for the execution and delivery of the notes. This, we think, justifies the further conclusion averred that the loan was usurious.

Plaintiff also contends on the authority of Smith v. Wright & Taylor Mfg. Co., 158 Ill. App. 386, and Kirby v. Tolman, 158 Ill. App. 350, that the court did not err in sustaining the motion of defendants because it was too broad; that the motion to vacate the judgment should have been denied, since it should have taken only for leave to plead.

The contention is quite technical. Without questioning the authorities cited we think the prayer of the petition here was broad enough to justify an order opening the judgment and allowing the defendants to plead; and under the facts set up in the petition such should have been the order of the court.

For the error indicated the judgment is reversed and the cause remanded with directions to enter such an order.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

33625

JULIAN J. FISHER,
Appellee,

vs.

AMERICAN SAND & GRAVEL CO.,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $3170.28 in favor of plaintiff entered upon the finding of the court.

The suit was for commissions alleged to be due on account of sand and gravel sold (as alleged) by plaintiff for defendant to the Niles Center Coal and Material Company and to the Norwood Park Coal and Supply Company.

The court found for plaintiff as to his claim on account of the sales to the Niles Center Coal and Material Company and for defendant as to the claim on account of alleged sales to the Norwood Park Coal and Supply Company. Plaintiff has assigned cross-errors in this court.

The evidence shows that during the year 1928 and prior thereto plaintiff was employed by defendant as a salesman on a commission basis, but defendant contends that under the terms of the agreement with plaintiff he was entitled to be paid commissions only on sand and gravel actually delivered. Defendant also contends that the agreements which plaintiff procured from the Niles Center and Norwood companies were invalid because of a lack of mutuality, and that defendant was therefore not liable to pay any commission on account of the same, except where actual delivery was made thereunder.

There is no dispute that plaintiff has been paid

35625

JULIAN J. KIRSEN, Appellee, vs. AMERICAN SAND & GRAVEL CO., a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $3170.22 in favor of plaintiff entered upon the finding of the court.

The suit was for commissions alleged to be due on account of sand and gravel sold (as alleged) by plaintiff for defendant to the Miles Center Coal and Material Company and to the Norwood Park Coal and Supply Company.

The court found for plaintiff as to his claim on account of the sales to the Miles Center Coal and Material Company and for defendant as to the claim on account of alleged sales to the Norwood Park Coal and Supply Company. Plaintiff has assigned cross-errors in this court.

The evidence shows that during the year 1920 and prior thereto plaintiff was employed by defendant as a salesman on a commission basis, but defendant contends that under the terms of the agreement with plaintiff he was entitled to be paid commissions only on sand and gravel actually delivered. Defendant also contends that the agreements which plaintiff procured from the Miles Center and Norwood companies were invalid because of a lack of mutuality, and that defendant was therefore not liable to pay any commission on account of the same, except where actual delivery was made thereunder.

There is no dispute that plaintiff has been paid

his commission for all material sold by him for defendant which the defendant has in fact delivered. The agreement with the Norwood company was "for your entire requirements for season of 1928." That with the Niles Center company was "for season of 1928 for approximately 20,000 yards of No. 2, 20,000 yards of No. 8 and 40,000 yards of No. 8 and 9 mixed. *** Providing contracts are awarded Niles Center Coal & Building Material Co., requiring this amount of material."

Defendant contends that both these agreements were void for want of mutuality, citing Chalmers v. Bledsoe, 218 Ill. App. 363. This case does not sustain defendant's contention but on the contrary sustains the contention of plaintiff. Also see Williston on Contracts, vol. 1, sec. 104, and cases there cited.

The decision of this point is, however, not controlling. The real question at issue does not concern contracts between defendant and its customers, but raises the question as to the actual agreement between plaintiff and defendant and as to whether that agreement bound defendant to pay a commission to plaintiff upon agreements obtained by plaintiff for defendant from customers in cases where the sale was not consummated by a delivery of the material. The contract of employment between plaintiff and defendant was oral. Mr. Alder, president of the defendant company, with whom plaintiff says his verbal contract was made, testifies that the agreement was that commission should be paid to plaintiff only upon material actually delivered. He testifies further that Mr. Thomas, sales manager of defendant, made the agreement with plaintiff. Thomas testifies positively that the agreement was that plaintiff should be paid a commission only where actual shipment was made on the orders which he obtained.

Plaintiff testifies that he made no agreement that he

his commission for all material sold by him for delivery only, the defendant has in fact delivered. The agreement with the cedar wood company was "for your entire requirements for season of 1948." That with the white cedar company was "for season of 1948 for approximately 25,000 yards of no. 2, 15,000 yards of no. 3 and 40,000 yards of no. 5 only." Each providing contracts are awarded after Carter has a multiple contract, i.e., requires this amount of material."

Defendant contends that both these agreements were void for want of mutuality, citing Chamberlin v. Johnson, 218 Ill. App. 523. This case does not sustain defendant's contention but on the contrary supports the proposition of plaintiff. Also see Williston on Contracts, vol. 1, sec. 104, and cases there cited.

The decision of this point is, however, not controlling. The real question at issue does not concern contracts between defendant and its customers, but raises the question as to the actual agreement between plaintiff and defendant and as to whether that agreement bound defendant to pay a commission to plaintiff upon agreements obtained by plaintiff for defendant from customers in cases where the sale was not consummated by a delivery of the material. The contract or agreement between plaintiff and defendant was oral. Mr. Alter, president of the defendant company, with whom plaintiff made his contract, testified was made, testified that the agreement was that commission should be paid to plaintiff only upon a sale to a customer delivered. He testifies further that Mr. Johnson, acting manager of defendant, made the agreement with plaintiff. Johnson testified positively that the agreement was that plaintiff would be paid a commission only where actual shipment was made on the agreement he obtained.

Plaintiff testifies that it was to be paid on agreements not

should not receive any commission unless delivery was made, but he (as all the witnesses on this point) testified to conclusions rather than to what was actually said at the time plaintiff was employed. Asked upon cross-examination if ever during the entire course of his employment he had been paid for sand and gravel never delivered, plaintiff replied, "No, sir, I do not recall that I was. I said I had been working as a salesman a matter of six years." Plaintiff was further cross-examined as follows:

> "The Court: During the course of that six years did you ever cause contracts between American Sand and Gravel Company and their customers for a period of time say, for a season or something like that before you entered into these contracts?
> A. As I recall, I did in the case of Norwood Park Coal and Supply Co.
> Q. Were you paid for entire amount of contract or for sand and gravel that was actually delivered?
> Mr. Carlson: I would like to enter an objection. What happened to any particular contract or sale that might have been agreed on between plaintiff and defendant here would have no bearing whether he is entitled to recover.
> The Court: Show a course of conduct, that is what I am questioning witness to ascertain.
> The Court: Did such occurrence ever happen?
> A. No, sir, I was paid on all material actually delivered."

It therefore appears from the testimony of plaintiff himself that in the usual course of business between the parties he had been paid a commission only in cases where actual delivery had been made upon orders taken by him.

Plaintiff cites Kahn v. McCready, 180 Ill. App. 325, to the point that the burden of proving non-delivery was on defendant. This rule of law is not disputed, but the evidence here shows conclusively that delivery was not in fact made of the material on account of which the commissions are claimed.

Plaintiff cites cases to the proposition that plaintiff was entitled to his commission whenever a valid and binding contract enforceable between the parties was made through his efforts. Mechem on Agency, 2nd ed., sec. 1512; Thompson v.

should not receive any consideration unless it knew was made, but he (as all the witnesses in this [illegible] testified to conversation rather than to what was actually said at the time plaintiff was employed. Asked upon cross-examination if he was during the entire course of his employment he had been [illegible] and travel never delivered, plaintiff replied, "Yes, sir, I do [illegible] recall that I was. I said I had been [illegible] a matter of six years." Plaintiff was further cross-examined as follows:

"The Court: During the course of that six years did you ever cause controversy between American Coal and Travel Company and their customers for a period of time [illegible], for a reason or something like that before you [illegible] to the contractor?

A. As I recall, I did in the case of American Coal and supply to.

. Were you paid for [illegible] amount of [illegible] and travel that was actually delivered?

Mr. Cartland: I would like to enter an objection. That happened to any particular contract or [illegible] been asked of been asked of between plaintiff and [illegible] have no bearing whatever on [illegible] to answer.

The Court: [illegible], but to what I am questioning relates to [illegible].

The Court: Did you [illegible] any [illegible]?

A. No, sir, I was paid [illegible] actually delivered."

[illegible]

[illegible] to the point that the burden of [illegible] [illegible] treatment. This rule of law is not [illegible], for the evidence here shows conclusively that [illegible] the material on account [illegible].

Plaintiff's [illegible] till was [illegible] contract [illegible] efforts. Because [illegible], and [illegible]

Frelinghuysen, 191 Ill. App. 204; Sackett v. Centaur Motor Co., 189 Ill. App. 372; Monroe v. Snow, 131 Ill. 126; Fox v. Ryan, 240 Ill. 391. In the cases cited the plaintiff acted as a broker in securing a sale of specific property; they are clearly distinguishable from cases like this, where a salesman is employed generally to sell goods upon commission. Stockton Commission Co. v. Narragansett Cotton Mills Co., 11 Fed., 2nd ed. 618.

As already stated, the controlling question here is, what was the actual agreement between plaintiff and defendant, rather than any question as to the terms or validity of agreements made between defendant and its customers. Plaintiff failed to prove an agreement whereby he should receive a commission upon orders taken where the goods were not in fact delivered.

The judgment entered is contrary to the facts and against the law, and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

Trellingwyson, 101 Ill. App. 304; Dougherty v. Yellow Motor Co., 199 Ill. App. 372; Moorse v. Moore, 131 Ill. 180; Van v. Lyon, 240 Ill. 391. In the cases cited the plaintiff acted as a broker in securing a sale of specific property; they are clearly distinguishable from cases like this, where a salesman is employed generally to sell goods upon commission. Dunkles Commission Co. v. Harrenmeyer Cotton Mills Co., 11 Fed., 2nd ed. 615.

As already stated, the counterclaim question here is, what was the actual agreement between plaintiff and defendant, rather than any question as to the terms or validity of agreements made between defendant and its customers. Plaintiff failed to prove an agreement whereby he should receive a commission upon orders taken where the goods were not in fact delivered.

The judgment entered is contrary to the facts and against the law, and it will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

McMurray, P. J., and O'Connor, J., concur.

33717

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN CANNON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

255 I.A. 631

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

An information filed against John Cannon June 21, 1929, charged a violation by him of section 4 of an act entitled, An Act revising a Law, Relating to Deadly Weapons (Smith-Hurd's Ill. Rev. Stat. 1929, chap. 38, sec. 155, p. 986.)

Defendant waived a jury and entered a plea of not guilty, and a motion in his behalf to suppress certain evidence was made but denied. Evidence was submitted. There was a finding of guilty with judgment thereon and a sentence that defendant pay a fine of $1 and be committed to the house of correction for three months.

A motion heretofore made by the state's attorney in this court to strike the statement of facts has been denied. That motion is renewed, and the only points in the brief for the state relate thereto. The motion having already been passed upon, we will not review our former decision.

It is urged in defendant's behalf that the allegations of the information are not supported by the evidence, first, in that it fails to establish that the defendant carried on or about his person a loaded revolver; secondly, in that there is no proof that defendant did not come within the exceptions of section 4, and was not a sheriff or other officer engaged in his official duties, and, thirdly, in that the evidence does not establish the guilt of

35919

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	No. 35919 Agenda No. 3
v.	SUPRA.
JOHN CANNON, Plaintiff in Error.	

MR. JUSTICE MCGOORTY DELIVERED THE OPINION OF THE COURT:

An information filed against John Cannon June 21, 1949, charged a violation by him of section 4 of an act entitled, "An act relating to a lien, Ballentine's Uniform Commercial Code-Sales Act." Rev. Stat. 1949, chap. 26, sec. 1[illegible], p. 3[illegible].)

Defendant waived a jury and entered a plea of not guilty, and a motion in his behalf to suppress certain evidence was made but denied. Evidence was submitted. There was a finding of guilty with judgment thereon and a sentence that defendant pay a fine of $1 and be committed to the house of correction for three months.

A motion for relief was made by the state's attorney in this court to strike the statement of facts has been filed. That motion is renewed, and the only points in our brief for the state relate thereto. The motion having already been [illegible], we will not review our former decision.

It is urged in defendant's behalf that the admissions of the information are not supported by the evidence, first, in that it fails to establish that the defendant carried on or "had his person a loaded revolver; second, in that [illegible] that defendant did not come within the exception [illegible] was not a sheriff or other officer engaged in his official [illegible], and, thirdly, in that the evidence does not establish [illegible]

defendant beyond reasonable doubt and the State failed to prove the venue.

The record shows that certain officers upon the hearing testified that they saw defendant Cannon and Louis Braverman walking from the exit of a hotel toward an automobile; that Cannon entered the automobile and sat down behind the steering wheel; that Braverman was walking toward the automobile; that the officers saw that the automobile did not have a state license or a city vehicle license attached thereto; that they thereupon approached the car and talked to Cannon and Braverman; that one of the officers saw Cannon, who was sitting in the car, remove something from his pocket which he dropped on the floor of the car, and that thereafter the officers searched the floor and found a pistol; that thereafter the officers searched Braverman and found a pistol in his pocket, whereupon Cannon and Braverman were arrested and booked for carrying concealed weapons.

This appears to have been all the evidence offered against defendant. There was no evidence showing that defendant was not a sheriff, coroner or other officer within the exceptions alleged in the information, but we think it was not necessary for the State to prove these negatives. People v. Martin, 314 Ill. 110; People v. Barnes, 314 Ill. 140; People v. Callicott, 322 Ill. 390.

It was, however, necessary for the State to prove that defendant was carrying a pistol, revolver or other firearm and that the same was concealed on or about his person. The evidence fails to establish that the "something" which defendant removed from his pocket and dropped upon the floor of the car was a pistol or other firearm, unless it can be said that that fact could be inferred from the statement that upon the search of the floor of the car the officers found a pistol. The evidence does not state, however, that the pistol that was found was the "something" removed from

defendant beyond reasonable doubt and the State failed to prove the venue.

The record shows that certain officers upon the hearing testified that they saw defendant Cannon and Willie Braverman walking from the exit of a hotel toward an automobile; that Cannon entered the automobile and sat down behind the steering wheel; that Braverman was walking toward the automobile; that the officers saw that the automobile did not have a state license or a city vehicle license attached thereto; that they therefore approached the car and talked to Cannon and Braverman; that one of the officers saw Cannon, who was sitting in the car, reaove something from his pocket which he dropped on the floor of the car, and that thereafter the officers searched the floor and found a pistol; that thereafter the officers searched Braverman and found a pistol in his pocket, whereupon Cannon and Braverman were arrested on a charge for carrying concealed weapons.

This appears to have been all the evidence offered against defendant. There was no evidence showing that defendant was not a sheriff, coroner or other officer within the exceptions alleged in the information, but we think it was not necessary for the State to prove these negatives. People v. Martin, 314 Ill. 110; People v. Ramos, 314 Ill. 140; Moore v. Williams, 372 Ill. 388.

It was, however, necessary for the State to prove that defendant was carrying a pistol, revolver or other firearm and that the same was concealed on or about his person. The evidence tends to establish that the "something" which defendant removed from his pocket and dropped upon the floor of the car was a pistol or other firearm, unless it can be said that that fact must be inferred from the statement that upon the search of the floor of the car the officers found a pistol. The evidence does not show, however, that the pistol that was found was the "something" removed from

defendant's pocket and dropped.

Moreover, the State failed to prove, if such was the fact, that the transaction occurred either within the County of Cook or the State of Illinois. There was no proof of the venue unless it may be said it might be inferred from the petition to suppress which was not offered in evidence; and for this reason the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., concurring: I concur in the conclusion but not in all that is said in the opinion.

O'Connor, J., dissents.

defendant's conduct and disposal.

Moreover, the State failed to prove, if such was the fact, that the transaction occurred within the County of Cook or the State of Illinois. There was no proof of the venue unless it may be said it might be inferred from the testimony of witnesses who did offered in evidence; in this case the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McGuire, P. J., concurring: I concur in the conclusion but not in all that is said in the opinion.

Gallagher, J., dissents.

MR. JUSTICE O'CONNOR Dissenting: In my opinion the judgment ought to be affirmed. I think the evidence shows beyond any doubt that the "something" which the defendant removed from his pocket and dropped on the floor of the car was the pistol which the officer immediately found on the floor of the car. I am also of the opinion that the evidence was sufficient to prove the venue that the defendant was arrested by the police officers in Chicago. The defendant filed his petition to suppress the evidence on the ground that he was searched by the police officer without a warrant and a revolver found. In his petition he swore that he "was apprehended and stopped by certain police officers in the employ of the City of Chicago under the supervision of one Sergeant Warren, employed by the police force of the City of Chicago," and he again refers to "the officers in the employ of the City of Chicago," etc. The evidence, which is written up in narrative form, states that two officers testified that they saw the defendant walk "from the hotel towards the automobile," that the defendant, John Cannon, entered the automobile and sat down behind the steering wheel; that the officers saw that the automobile did not have a state or city license attached; that thereupon they approached the car, found the revolver and made the arrest as testified. The evidence shows that the officers were police officers of the City of Chicago, and the presumption ought to be indulged that they were performing their duties where alone that had a right to perform such duties, namely, in the City of Chicago. In People v. Huffman, 325 Ill. 334, it was said (p. 335): "While it is not necessary that any witness should testify in so many words that a crime was committed in a certain county in order to establish the venue, (People v. Shaw, 300 Ill.451) and the venue can be proven by circumstances, (People v. Farnsworth, 324 Ill. 96) yet when circumstances, alone, are relied upon for such proof, the circumstances must be such as to exclude every reasonable

[illegible] JUSTICE [illegible] dissenting: In my opinion the judgment ought to be affirmed. I think the evidence above reported [illegible] any doubt that the "admission" which the defendant received from his parent and [illegible] in the [illegible] of the car was the result of [illegible] the officer immediately [illegible] by the [illegible] of the [illegible]. I am also of the opinion that the evidence was sufficient to prove the [illegible] that the defendant was arrested by the police officers in Chicago. The defendant filed his petition to suppress the evidence on the ground that he was searched by the police [illegible] without a warrant and a revolver found. In his petition he stated that he was apprehended and searched by certain police officers in the employ of the City of Chicago under the supervision of one Sergeant Barrett, employed by the police force of the City of Chicago." [illegible] he again returns to "the officers in the employ of the City of Chicago," etc. The evidence, which [illegible] quite [illegible], shows that two officers [illegible] in a [illegible] with [illegible] hotel towards the automobile, [illegible] the [illegible], where the automobile had been [illegible] the officers saw [illegible] the [illegible] city limits [illegible], that [illegible] the [illegible], found the revolver and made [illegible] the evidence [illegible] the officers were police [illegible] Chicago, [illegible] stream-police squad [illegible] were particularly in [illegible] where [illegible] in the City of Chicago. [illegible] 334, [illegible] said (p. 338): "While it is [illegible] that [illegible] legally in so many words [illegible] in a certain county in order to establish [illegible] crime, [illegible] (p. 341) and the venue can be proven by circumstances, [illegible] 326 Ill. 30) [illegible] stream, the officers [illegible] more than [illegible], the circumstances [illegible] in a strange every [illegible]

hypothesis other than that the crime was committed in the county in which the venue is laid in the indictment." In the instant case we think every reasonable hypothesis other than that the crime was committed in the City of Chicago is shown by the facts and circumstances above stated. Sullivan v. People, 122 Ill. 385, 387.

hypothesis other than that the crime was committed in the county in which the venue is laid in the indictment." In the instant case we think every reasonable presumption occurs that the crime was committed in the City of Chicago as shown by the facts and circumstances above stated. Whiting v. People, 167 Ill. 379, 387.

33724

TAYLOR WASHING MACHINE COMPANY,
a Corporation,
Appellee,

vs.

JOHN SCHASCHL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 631

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, John Schaschl, from a judgment against him in the sum of $140, entered upon the verdict of a jury which was returned upon the direction of the court.

No evidence was offered or received either on behalf of the plaintiff or the defendant, and the sole question to be determined is whether, under the admitted facts as established by the pleadings, plaintiff is entitled to recover.

Plaintiff in its statement of claim avers that there is due to it the sum of $140, being the unpaid balance of the price of a washing machine sold and delivered to Mrs. John Schaschl on August 20, 1928. It avers that on that date Mrs. John Schaschl was the wife of John Schaschl and that they resided together as husband and wife in Chicago, Cook County, Illinois, whereby they became jointly and severally liable to plaintiff for family expenses by virtue of section 15, chapter 68 of the Revised Statutes of the State of Illinois.

It appears that the husband alone was served; that he appeared and demanded a trial by jury and filed an affidavit of merits, stating that his defense was that the washing machine was sold to his wife under a conditional sales agreement without his knowledge or consent; that immediately upon ascertaining the alleged purchase he notified plaintiff that the washing machine had been purchased without his knowledge and consent; that he was unable to

32754

UNITED MARINE SERVICE CORPORATION,
a corporation,
Appellee,

vs.

JOHN DOE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Mr. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, John Doe, from a judgment against him in the sum of $[illegible], entered upon the verdict of a jury which was returned upon the direction of the court.

No evidence was offered or received [illegible] behalf of the plaintiff in the case, but it was agreed by the parties to be determined in chambers, under the affidavit filed as substituted by the pleadings, plaintiff is entitled to recover.

Liability in the statement of claim arises [illegible] due to it the sum of $[illegible], being the amount [illegible] wrongful mooring which it was forced to pay, upon demand, to [illegible] Co., Ltd. It appears that on the [illegible] day of [illegible] while at [illegible] and tied [illegible] while in [illegible], Lake County, Illinois, [illegible] and severally liable to plaintiff for the [illegible] resulting if, whether [illegible] Illinois.

[illegible]

[illegible] by [illegible] series, stating that [illegible] boat [illegible] brought [illegible] purchase by notified plaintiff [illegible] purchased without his knowledge and consent; that he was [illegible]

pay for the same and offered to return it to plaintiff in the same condition it was at the time of the delivery thereof; that plaintiff refused to accept the return of the washing machine and that he, defendant, stored the washing machine for the benefit of plaintiff and "was at all times and is now ready, willing and able to return the said washing machine to the plaintiff in the same condition that it was at the time of the delivery thereof."

The affidavit of merits denied that the supposed sale came within the purview of said section 15, chapter 68 of the Illinois statutes, as alleged, or that defendant was indebted to plaintiff in any sum whatever.

No appearance has been filed in this court by plaintiff.

It is difficult to understand upon what theory the trial Judge could have directed a verdict for plaintiff since the affidavit of merits set up a complete defense.

The judgment must be reversed on the authority of Robertson v. Warden, 197 Ill. App. 478, and Blackstone Shop v. Ashman, 250 Ill. App. 401, and the cause will be remanded for trial.

REVERSED AND REMANDED.

McSurely, P. J., and O'Connor, J., concur.

pay for the same and offered to tender it to plaintiff in the same condition it was at the time of the delivery thereof; that plaintiff refused to accept the return of the washing machine and that he, defendant, stored the washing machine for the benefit of plaintiff and "was at all times and is now ready, willing and able to return the said washing machine to the plaintiff in the same condition that it was at the time of the delivery thereof."

The affidavit of merits denied that the aggrieved acts were within the purview of said section 13, contrary to the Illinois statutes, as alleged, or that defendant was indebted to plaintiff in any sum whatever.

No appearance has been filed in this court by plaintiff.

It is difficult to ascertain upon what theory the trial Judge could have directed a verdict for plaintiff upon the affidavit of merits set up a complete defense.

The judgment must be reversed on the authority of Robertson v. Warden, 187 Ill. App. 47; and Lincoln-Ogden v. Kaiman, 236 Ill. App. 401, and the cause will be remanded for trial.

REVERSED AND REMANDED.

McCurdy, P. J., and Gridley, J., concur.

33755

JAMES A. CARTER,
Appellee,
vs.
WILL HOWELL & ASSOCIATES,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 631

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $450 entered upon the finding of the court.

The statement of claim avers a balance due in that amount for services rendered in securing advertisements for a golf tournament program. It also avers an account stated between the parties.

The affidavit of merits asserts an agreement between plaintiff and defendant to share equally the profits derived in printing the program; avers that defendant was to finance and lay out the program and that plaintiff was to assume the responsibility of selling sufficient advertising to make the venture a success and to devote all his time to it, which he failed to do.

Evidence was submitted by both parties. It appears therefrom that there was no dispute as to the terms of the contract nor as to the averment of plaintiff that defendant in part failed to comply with his promises with reference to securing the advertising. After the transactions were closed defendant wrote a letter to plaintiff and made a statement of the outcome of the venture showing net receipts of $4405.42, cost of printing amounting to $2091.33, commissions paid amounting to $572.75, leaving a balance due of $1,741.34, of which plaintiff's share was stated to be $870.67. From this sum two collections made by plaintiff amounting to $140 and a further sum of $130 due from plaintiff to defendant for two months' rent were deducted, leaving a balance due to

[illegible]

JAMES A. [illegible],
Appellant,

vs.

WILL ROGERS [illegible],
a Corporation,
Appellees.

[illegible]

[illegible]

plaintiff

defendant of $600.67. This statement also charged against plaintiff on account of "Mount Vernon Country Club" an item of $450.00, leaving a balance of $150.67, for which a check was enclosed.

It is admitted that the item as to commissions paid is on account of payments made to parties employed to complete the work which plaintiff undertook to do, and he makes no objection to the allowance of that item.

The evidence discloses that the item as to $450 with reference to the Mount Vernon Countyy Club concerned a matter which was in no way connected with the contract upon which plaintiff sues, and the court held that, in view of the pleadings, evidence tending to show that plaintiff was indebted on that item might not properly be received. In the absence of a claim of off-set defendant could recoup, but a recoupment must arise out of the same subject matter and transaction as that sued on. Bostrom v. Becker, 172 Ill. App. 410. This item did not arise in that way.

The defense which defendant sought to interpose was not set up in his affidavit of merits, and evidence of it was therefore properly excluded by the court. Cooper v. Anderson, 246 Ill. App. 1.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

[illegible]

[illegible] of $[illegible]. This [illegible] also charged a [illegible] claim on account of "Mount Vernon Country Club" [illegible], leaving a balance of $[illegible], [illegible] was [illegible].

It is [illegible] on account of [illegible] work which plaintiff undertook [illegible] the allowance of that [illegible].

[illegible] reference to [illegible] which was in no way [illegible] the [illegible] case the [illegible] to [illegible] was [illegible] on [illegible] property. [illegible] proceeds [illegible] and [illegible] [illegible] 4th. [illegible] 4th.

[illegible] not [illegible] [illegible] fore [illegible] App. 1.

[illegible]

[illegible]

Respectfully, [illegible]

33407

THERON P. COOPER,
Plaintiff in Error,

vs.

JOHN A. ANDERSON,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

255 I.A. 631

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, as assignee of a lease demising certain premises in Chicago, brought suit to recover $4500 claimed to be rent due under the lease, against defendant, who had guaranteed the payment of the rent. There was a verdict and judgment in defendant's favor and plaintiff prosecutes this writ of error. At a former trial of the case, at the close of plaintiff's evidence, there was a directed verdict in favor of the defendant. Judgment was entered on the verdict and an appeal prosecuted to this court, where the judgment was reversed and the cause remanded. Cooper v. Anderson, 246 Ill. App. 1.

A preliminary question is presented by the defendant in its brief, i. e., that the bill of exceptions not being presented within the time fixed by the trial court is improperly in the transcript of the record before us. A motion was heretofore made by the defendant to strike the bill of exceptions from the record on this ground and the motion was denied. That disposes of the matter. However, there is no merit in defendant's contention because the time for filing the bill of exceptions in the trial court was extended by stipulation of the parties. Loeff v. Taussig, 102 Ill. App. 398; Hawes v. The People, 129 Ill. 123.

The record discloses that plaintiff was claiming rent for the period from February 1, 1919, to August 1, 1920, at the rate of $250 a month, payable monthly in advance on the first of each and every month. The instant case was commenced

on July 21, 1920, and the record discloses that the case was passed from time to time. Neither party seemed to be desirous of trying the case. The first trial was commenced December 15, 1926, and the verdict and judgment rendered the next day, more than six years after the suit was brought. On March 2, 1927, the record on appeal was filed in this court. The reply brief was filed July 5, 1927, and our opinion reversing the judgment and remanding the cause was filed October 10, 1927. On November 16, 1927, the remanding order was filed in the trial court; and on December 29, 1927, counsel for defendant moved the court for leave to file an amended affidavit of merits, in which he sought to set up (1) that there was no valid assignment of the lease to the plaintiff; (2) that there was no default by the tenant in the payment of rent; and (3) that on February 4, 1919, the defendant was released and discharged of all liability by the payment of $1,000 and the transfer of certain furniture. The first and second grounds just mentioned were not in defendant's affidavit of merits on file when the case was tried the first time but the third ground was. In the special count plaintiff had alleged that he was the owner of the leasehold interest by assignments and attempted to make them a part of the declaration by attaching them as exhibits (which obviously could not be done. Plew v. Board, 274 Ill. 232.) He also alleged the default in payment of the rent. On the first trial plaintiff sought to prove the allegations of the special count by introducing oral and documentary evidence, and at the close of all his evidence the court held the proof was insufficient and directed a verdict for the defendant. The holding of this court on the appeal, as shown by the opinion filed, was that since defendant in his affidavit of merits had set up as his only defense that he had been released from his liability by the payment of the thousand dollars and the turning over of the furniture, he was limited to that defense, and the allegations of plaintiff that

on July 21, 1926, and the record discloses that the case was heard from time to time. Neither party seems to be desirous of trying the case. The first trial was commenced December 18, 1926, and the verdict and judgment rendered the next day, more than six years after the suit was brought. On March 4, 1927, the record on appeal was filed in this court. The newly brief was filed July 5, 1927, and our opinion reversing the judgment and remanding the cause was filed October 10, 1927. On November 16, 1927, the remanding order was filed in the trial court; and on December 5, 1927, counsel for defendant moved the court for leave to file an amended affidavit of merits, in which he sought to set up (1) that there was no valid assignment of the lease to the plaintiff; (2) that there was no default by the tenant in the payment of rent; and (3) that on February 4, 1925, the defendant was released and discharged of all liability by the payment of $1,500 and the transfer of certain furniture. The first and second grounds just mentioned were not in defendant's affidavit of merits as filed when the case was tried a first time but the third ground was. In the special count of plaintiff's amended that he was the owner of the insurance interest by assignment and attempted to make them a part of the declaration by attaching them as exhibits (which obviously could not be done. Allen v. Ford, 274 Ill. 532.) He also alleged the default in payment of rent. On the first trial plaintiff sought to prove the allegations of the special count by introducing oral and documentary evidence, and at the close of all his evidence the court held as a matter of law that defendant was entitled to a verdict for the defendant. The judgment of this court on the appeal, as shown by the opinion filed, held that since defendant in his affidavit of merits had set up as his only defense that he had been released from the liability by the payment of the thousand dollars and the turning over of the furniture, he was limited to that defense, and the affidavit was insufficient as

he was the owner of the leasehold interest and that there was $4500 rent due and unpaid stood admitted of record.

The plaintiff, in opposing defendant's motion for leave to file an amended affidavit of merits, filed an affidavit that if the defense set up in the proposed amended affidavit of merits had been filed when defendant filed his pleas, he would have obtained the deposition of Richard T. Haines, and made proof of the allegations of his declaration. Haines then being a resident of Chicago; but that Haines, whose deposition would have been taken to make such proof, was then absent from Chicago and the proof could not be made otherwise.

We think the court erred in refusing defendant leave to file the amended affidavit of merits. On the first trial plaintiff sought to make proof of the facts as alleged in his declaration, but Haines was not called nor was his deposition taken. Both parties assumed on the first trial that the burden was on the plaintiff to make proof and it was only after the opinion of this court was filed that it appeared that the burden was on the defendant. But in any event, we think the judgment entered in the present trial must be affirmed.

Plaintiff contends that the court erred in admitting improper evidence on behalf of the defendant. On the trial the defendant assumed the burden and offered evidence tending to show that some of the rent claimed by plaintiff had been paid. This was admitted over plaintiff's objection and he claims this was reversibly erroneous. We think plaintiff is not in position to urge this contention. The record discloses that defendant offered in evidence three items shown by the books of McLane & Co., who were agents of plaintiff in renting the premises and collecting the rent. Counsel for plaintiff objected to this, but upon being overruled he stated: "The court has ruled against me, and I think properly, that you are

he was the owner of the leasehold interest and that there was $4500 rent due and unpaid stood admitted of record.

The plaintiff, in opposing defendant's motion for leave to file an amended affidavit of merits, filed an affidavit that if the defense set up in the proposed amended affidavit of merits had been filed when defendant filed his plea, he would have obtained the deposition of Richard T. Haines, and made proof of the allegations of his declaration. Haines then being a resident of Chicago; but that Haines, whose deposition would have been taken to make such proof, was then absent from Chicago and the proof could not be made otherwise.

We think the court erred in refusing defendant leave to file the amended affidavit of merits. In the first trial plaintiff sought to make proof of the facts as alleged in his declaration, but Haines was not called nor was his deposition taken. Both parties assumed on the first trial that the burden was on the plaintiff to make proof and it was only after the opinion of this court was filed that it appeared that the burden was on the defendant. But in any event, we think the judgment entered in the present trial must be affirmed.

Plaintiff contends that the court erred in admitting improper evidence on behalf of the defendant. On the trial the defendant assumed the burden and offered evidence tending to show that some of the rent claimed by plaintiff had been paid. This was admitted over plaintiff's objection and he claims this was reversible error. We think plaintiff is not in position to make this contention. The record discloses that defendant offered in evidence three items shown by the books of Adams & Co., who were agents of plaintiff in renting the premises and collecting the rent. Counsel for plaintiff objected to this, but upon being overruled he stated: "The court has ruled against me, and I think properly. But you are

entitled to prove payments of rent under the general issue." Having taken this position on the trial he will not now be permitted to shift his position and say that the evidence was improperly admitted.

Complaint is also made by the plaintiff that the court improperly instructed the jury, and the abstract sets forth only the two instructions complained of; it does not purport to abstract all of the instructions. An examination of the record discloses that the court gave eleven instructions, five at the request of plaintiff and six at defendant's request. Errors in giving instructions will be considered on appeal when all the instructions given are presented by the abstract. Roodhouse v. Christian, 158 Ill. 137; Briggs v. Page, 222 Ill. App. 223. However, we have considered all of the instructions in the record and although they are somewhat conflicting, yet upon a consideration of the entire record we are of opinion the verdict ought not to be disturbed.

By the two instructions complained of the court told the jury that before the plaintiff could recover he must prove (1) that he had acquired the rights of the lessors, and (2) that defendant made default in the payment of rent and the amount of default. By other instructions given at plaintiff's request the jury were told that under the issues in the case the defendant admitted that he became liable to pay rent in the sum of $4500, but that he claimed he was discharged from liability in consideration of the payment by him of the thousand dollars and the transfer of furniture; that the defendant was required to prove such discharge by the preponderance or greater weight of evidence, and unless the jury were satisfied that such proof had been made, they must find the issues for the plaintiff. The court also instructed the jury at plaintiff's request that payment by the defendant to

entitled to prove payments of rent under the general issue." Having taken this position on the trial he did not be permitted to shift his position and say that the evidence was improperly admitted.

Complaint is also made by the plaintiff that the court improperly instructed the jury, and the contract sets forth only the two instructions complained of, if there not purport to abstract all of the instructions. An examination of the record discloses that the court gave eleven instructions, five at the request of plaintiff and six at defendant's request. Errors in giving instructions will be considered on appeal when all the instructions given are presented by the abstract. Mechanics v. Christian, 188 Ill. 187; Hilgen v. Case, 188 Ill. App. 183. However, we have considered all of the instructions in the record and although they are somewhat conflicting, yet upon a consideration of the entire record we are of opinion the verdict ought not to be disturbed.

By the two instructions complained of the court told the jury that before the plaintiff could recover he must prove (1) that he had so mixed the figure of the license, and (2) that defendant made default in the payment of rent and the amount of default. By other instructions given at plaintiff's request the jury were told that under the issues in the case the defendant admitted that he became liable to pay rent in the sum of [illegible], but that he claimed he was discharged from liability in consideration of the payment by him of the [illegible] and the [illegible] for of furniture; that the defendant was required to prove [illegible] discharge by the preponderance or greater weight of evidence, and unless the jury were satisfied that such proof had been [illegible], they must find the issues for the plaintiff. The jury also instructed the jury at plaintiff's request that payment by the defendant to

plaintiff's real estate agents was not sufficient to discharge defendant from liability, but the jury must also find that there was an acceptance or ratification by the plaintiff to have defendant's obligation cancelled or discharged; that unless the jury believed from the evidence that plaintiff authorized or ratified such cancellation, then they should find for plaintiff.

The uncontradicted evidence shows that defendant paid $1,000 to plaintiff's renting agents and delivered to them a bill of sale for certain furniture which was worth some $2,500, in consideration of which they stated that defendant would be released from liability under his guarantee. This money was paid and the bill of sale executed in February, 1919. There was other evidence tending to show that before the payment was made and the bill of sale executed, the real estate agents stated they would take the matter up with plaintiff. The question was squarely put up to the jury as to whether the payment of the thousand dollars and the execution of the bill of sale were authorized by plaintiff, or the action of the real estate agents in this respect had been ratified by plaintiff.

We think the question was one of fact for the jury, and was so treated by both parties, and that the finding in favor of the defendant is not against the manifest weight of the evidence. Plaintiff offered no evidence, and upon a consideration of the entire record we are unable to say that the giving of the two instructions at the request of defendant prejudicially affected plaintiff. The case has been tried twice and we are of opinion that another trial would not bring about a different result.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

plaintiff's real estate agents was not authorized to discharge defendant from liability, but the jury must also find that there was no acceptance or ratification by the plaintiff to have defendant's obligation cancelled or discharged; that unless the jury believed from the evidence that plaintiff authorized or ratified such cancellation, then they should find for plaintiff.

The uncontradicted evidence shows that defendant paid $1,000 to plaintiff's renting agents and delivered to them a bill of sale for certain furniture which was worth more $2,500, in consideration of which they stated that defendant would be released from liability under his guarantee. This money was paid and the bill of sale executed in January, 1919. There was other evidence tending to show that before the payment was made and the bill of sale executed, the real estate agents stated they would take the matter up with plaintiff. The question was equitably put by to the jury as to whether the payment of the discounted income and the execution of the bill of sale were authorized by plaintiff, or the action of the real estate agents in this regard had been ratified by plaintiff.

We think the question was put to the jury, and was so treated by both parties, and that the finding in favor of the defendant is not against the manifest weight of the evidence. Plaintiff offered no evidence, and upon a preponderance of the evidence record we are unable to say that the finding of the trial court at the request of defendant erroneously deprived plaintiff. The case has been tried twice and we see no reason that another trial would not bring about a different result.

The judgment of the superior court of cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Babcock, J., concur.

33523

HARRY KORSHAK,
Defendant in Error,

vs.

LOUIS ASKER,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover $3,000 claimed to be due under the terms of a contract entered into with the defendant. There was a verdict and judgment in plaintiff's favor for $1,000 and the defendant appeals.

Plaintiff's declaration was in three counts. In the first it was alleged that plaintiff was engaged in the general contracting business of constructing, repairing and remodeling residential and business property and that he was employed by the defendant "as such general contractor, to supervise and construct" two apartment buildings for which plaintiff was to be paid ten per cent of the cost of the construction of the buildings, but in no event was plaintiff's compensation to be less than $3,000 or more than $5,000; that thereafter plaintiff employed an architect who prepared plans and specifications which were submitted to the defendant and approved by him; that plaintiff obtained estimates from various contractors of the cost of constructing the buildings; that defendant, in violation of the contract, after he had received the plans and estimates of the cost, awarded the work to another and refused to let plaintiff perform his contract; that the cost of the two buildings would be $30,000 and that under the contract plaintiff was entitled to ten per cent of this or $3,000.

The second count was substantially the same except that it was alleged that under the custom prevailing and under the agreement plaintiff was entitled to receive ten per cent of the cost of the buildings. The breach of the contract by the defendant

32323

HARRY KORNMAN,
Defendant in Error,

vs.

LOUIS ABRAM,
Plaintiff in Error,

Error to the Circuit Court
of Cook County.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

Plaintiff brought an action against the defendant to recover $3,000 claimed to be due under the terms of a contract entered into with the defendant. There was a verdict and judgment in plaintiff's favor for $1,[illegible] and the defendant appeals.

Plaintiff's declaration was in [illegible] counts. In the first it was alleged that plaintiff was employed in the general contracting business of constructing, erecting and repairing residential and business property; that in the employ by the defendant "on such general contracting, to supervise and construct two apartment buildings for said plaintiff and [illegible] per cent of the cost of the construction of said building," for an [illegible] event was plaintiff's [illegible] more than $3,000; that [illegible] who prepared plans and specifications which were accepted by the defendant and approved by him; that plaintiff obtained estimates from various contractors of the cost of constructing the buildings; that defendant, in violation of the contract, [illegible] the plans and specifications [illegible] and refused to let plaintiff [illegible]; that the cost of the two buildings would be $[illegible], and that under the contract plaintiff was entitled to ten per cent of this or $3,[illegible].

The second count was similar, the gravamen of it being that it was alleged that under the [illegible] agreement plaintiff was entitled to receive [illegible] of the buildings. The [illegible] of the [illegible]

was then alleged, and further that plaintiff was ready, able and willing to perform the services required of him but was prevented from doing so by the defendant awarding the contract to another party; that by reason of the breach of the contract by the defendant plaintiff was "deprived of the fair, usual and reasonable charges which he was rightly entitled to under and by virtue of said contract and custom." The third count was not materially different from the first.

An affidavit of claim was attached to the declaration in which it was set up that there was due and owing from the defendant to the plaintiff, after allowing all deductions, set-offs and counter claims, "as and for services rendered as a general contractor, under and by virtue of an agreement entered into between the plaintiff and defendant ***." $3,000.

The defendant filed a general issue add an affidavit of merits in which he denied liability and denied that he had employed plaintiff as general contractor to supervise the construction of the two buildings.

The evidence tends to show that some time in September, 1925, plaintiff and defendant met, when defendant advised him that he owned two vacant lots and was desirous of constructing buildings on them; that an oral agreement was entered into between the parties whereby plaintiff was employed as a general contractor to obtain a survey and to prepare plans and specifications and obtain bids for the construction of two apartment buildings on the property; that plaintiff and defendant visited the property and thereafter plaintiff caused a survey to be made and an architect was employed to draw plans and specifications for the buildings; that the parties met frequently thereafter, going over the plans prepared by the architect; that the first set of plans was rejected because the Building Department of the City refused to

was then alleged, and further that plaintiff was ready, able and willing to perform the services required of him but was prevented from doing so by the defendant awarding the contract to another party; that by reason of the breach of the contract by the defendant plaintiff was "deprived of the fees, usual and reasonable charges which he was legally entitled to make for his skill and said contract and services." The bill sued for not materially different from the first.

An affidavit of claim was entered to the declaration in which it was set up that there was due and owing from the defendant to the plaintiff, after allowing all discounts, credits and counter claims, "as and for services rendered by a general contractor, under and by virtue of an agreement entered into between the plaintiff and defendant as," $3,000.

The defendant filed a general issue and an affidavit of merits in which he denied liability and denied that he had employed plaintiff as general contractor to superintend the construction of the two buildings.

The evidence tends to show that when in December, 1893, plaintiff and defendant met, the defendant informed him that he owned two vacant lots and his desires of constructing buildings on them; that an oral agreement was entered into between the parties whereby plaintiff was employed as general contractor to obtain a survey and to procure plans and specifications and obtain bids for the construction of the contemplated buildings on the property; that plaintiff and defendant visited the property. Thereafter plaintiff obtained a survey to be made and a plan was employed to draw plans and specifications for the buildings; that the parties met frequently thereafter, and plaintiff was prevented by the defendant; that the plans and specifications were prepared by the architect; that the plans and specifications were delayed because the building department of the city required to

approve them and the matter was taken to the Zoning Board of Appeals where the plans were again rejected. Afterwards other plans were prepared which were approved and plaintiff secured bids from a number of different contractors and they were submitted to the defendant; that the total cost of the two buildings, as shown by the bids submitted by the several contractors was $30,000; that defendant took the plans and told the plaintiff to go ahead with the work; that this was about the first of December; that a day or two thereafter the defendant, using the plans, obtained bids from other contractors whereby there was a saving of about $4,000; that plaintiff was then notified that his services would be no longer needed, and the work was given to other parties who proceeded to construct the buildings.

There was no instruction given to the jury, nor was any requested by either party which enlightened the jury as to plaintiff's measure of damages. There is no evidence in the record, nor was any offered, tending to show the reasonable value of the services rendered by the plaintiff. But the theory of the plaintiff was and is that he was entitled to receive $3,000, and although the jury returned a verdict for but $1,000 it should not be disturbed because plaintiff did not receive all that he was entitled to. There is no count in the declaration, as defendant contends, based on the theory that plaintiff was entitled to recover on a <u>quantum meruit</u>, nor was there any evidence offered on this theory. It is obvious that plaintiff had not performed all of the services required by the contract. If he had done so he would have received, according to his own contention, $3,000. Assuming, as we must, that plaintiff was wrongfully discharged by the defendant, plaintiff could not recover the contract price unless there was evidence tending to show that he had been damaged that amount by reason of the work he had done and by reason of the further fact that he had

approve them and the matter was taken to the Planning Board of Appeals where the plans were again rejected. Alternative other plans were prepared which were approved and plaintiff secured bids from a number of different contractors and they were submitted to the defendant; that the total cost of the two buildings, as shown by the bids submitted by the several contractors was $34,000; that defendant took the plans and told the plaintiff to go ahead with the work; that this was about the first of December; that a day or two thereafter the defendant, using the plans, obtained bids from other contractors whereby there was a saving of about $4,000; that plaintiff was then notified that his services would be no longer needed, and the work was given to other parties who proceeded to construct the buildings.

There was no instruction given to the jury, nor was any requested by either party which authorized the jury to find plaintiff's measure of damages. There is no evidence in the record, nor was any offered, tending to show the reasonable value of the services rendered by the plaintiff. But the theory of the plaintiff was and is that he was entitled to receive $4,000. And although the jury returned a verdict for but $2,000 it should not be disturbed because plaintiff did not receive all that he was entitled to. There is no doubt in the defendant, or reflection conclusive, but on the theory that plaintiff was entitled to recover for a quantum meruit, nor was there any evidence offered on this theory. It is obvious that plaintiff had not performed all of the services required by the contract. If he had, he should have received, according to his own contention, $4,000. Assuming, as we must, that plaintiff was wrongfully discharged by defendant, plaintiff could not recover the contract price unless it was established beyond to show that he had been ready and willing to complete the work he had done and by reason of the defendant that he had

been prevented from performing the work required of him. There being no basis in the declaration nor in the proof to warrant the judgment of $1,000, the judgment must be reversed.

Since there must be a new trial, we think we ought to say that the contention of the defendant that the court erred in admitting blueprints and other documents in evidence over his objection is untenable. Plaintiff had a right to prove what he had done in the matter, and the evidence of blueprints was some evidence tending to show some of the services performed by the plaintiff. Complaint is also made of the giving of the 7th instruction on behalf of plaintiff. In view of what we have said in reference to the declaration, and lack of proof, and the theory on which plaintiff might recover, it is obvious that this instruction will not be given on a re-trial of the case. We are also of the opinion that the contention of the defendant, which seems to be that the verdict is against the manifest weight of the evidence, is unsound. On the contrary, we think the manifest weight of the evidence is that plaintiff was employed by the defendant, as he testified, and that he performed the services substantially as testified to by him.

For the reasons above stated the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

been prevented from performing the work required of him. There being no basis in the declaration nor in the proof to warrant the judgment of $1,000, the judgment must be reversed.

Since there must be a new trial, we think we ought to say that the contention of the defendant that the court erred in admitting blueprints and other documents in evidence over his objection is untenable. Plaintiff had a right to prove what he had done in the matter, and the evidence of blueprints was some evidence tending to show some of the services performed by the plaintiff. Complaint is also made of the giving of the 7th instruction on behalf of plaintiff. In view of what we have said in reference to the declaration, and lack of proof, and the theory on which plaintiff might recover, it is obvious that this instruction will not be given on a re-trial of the case. We are also of the opinion that the contention of the defendant, which seems to be that the verdict is against the manifest weight of the evidence, is unsound. On the contrary, we think the manifest weight of the evidence is that plaintiff was employed by the defendant, as he testified, and that he performed the services substantially as testified to by him.

For the reasons above stated the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

33550

FOREMAN TRUST & SAVINGS BANK,
a Corporation, as Trustee,
Appellee,
vs.
FRANK DEMETER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused a judgment by confession to be entered in its favor for $1,025 against the defendant. The judgment purported to be entered in accordance with the terms of a lease and the claim made was $1,000 for rent for January, 1929, and $25 attorney's fees. Afterwards, on motion of the defendant, supported by his affidavit, the judgment was opened up and he was given leave to defend. There was a jury trial and at the close of all the evidence the court, of its own motion, instructed the jury to return a verdict for plaintiff, which was accordingly done. Judgment was entered on the verdict and the defendant appeals.

The record discloses that on December 1, 1924, a written lease was entered into between the Lindlahr Sanitarium, Incorporated, a corporation, as landlord, and the defendant, Frank Demeter, as tenant. The lease covered property known as numbers 509 to 533 (both inclusive) South Ashland boulevard, Chicago, and was for a period of ten years from December 1, 1924, until November 30, 1934, at a rental of $1,000 a month. In addition to the rent the tenant was required to pay taxes and all other charges levied or imposed upon the property. He was further required to insure the property in such companies as might be approved by the landlord, and the loss, if any, was payable to the landlord. The lease further provided that in case the property was destroyed or damaged by fire, the landlord should pay to the tenant, upon proper architect's certificates, so much of the insurance money as might be required to repair or rebuild the

ROSSMAN TRUST & SAVINGS BANK, a corporation, as trustee, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
FRANK DREXLER, Appellant.	

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff secured a judgment by confession to be entered in its favor for $1,025 against the defendant. The judgment purported to be entered in accordance with the terms of a lease and the claim made was $1,000 for rent for January, 1933, and $1[illegible] attorney's fees. Afterwards, on motion of the defendant, supported by his affidavit, the judgment was opened up and he was given leave to defend. There was a jury trial and at the close of all the evidence the court, of its own motion, instructed the jury to return a verdict for plaintiff, which was accordingly done. Judgment was entered on the verdict and the defendant appeals.

The record discloses that on December 1, 1924, a written lease was entered into between the plaintiff bank, incorporated, a corporation, as landlord, and the defendant, Frank Drexler, as tenant. The lease covered property known as numbers 506 to 525 (both inclusive) South Ashland boulevard, Chicago, and was for a period of two years from December 1, 1924, until November 1, 1926, at a rental of $1,000 a month. In addition to the rent the tenant was required to pay taxes and all other charges levied or imposed upon the property. He was further required to insure the property in such sum as might be approved by the landlord, and the lease, if any, was assigned to the landlord. The lease further provided that in case the property was destroyed or damaged by fire, the landlord should pay to the tenant, upon proper architect's certificates, so much of the insurance money as might be required to repair or rebuild the

building; that if there were any surplus remaining, it should be paid by the landlord to the tenant.

The tenant entered into possession and made all the payments and performed all of the agreements as required by the lease. On November 16, 1925, the landlord assigned all of its interest in the lease to Otto Michael Rice, and Rice on December 30, 1926, assigned all his interest to Morris Goldman, and the latter on January 31, 1928, assigned all his interest in the lease to the plaintiff, the Foreman Trust and Savings Bank, as trustee, under Trust No. 3337.

The evidence shows that the premises were improved by nine buildings, but the nature or character of them does not appear; that on December 23rd a fire broke out and damaged three of the buildings so that they were untenantable, and on that day the defendant-tenant notified Arnold Marks, of Marks & Company, with whom he had all dealings with reference to the property, of the fire; that thereupon Marks came to the premises and saw what damage had been done; that the tenant then told Marks to have the buildings repaired, which Marks refused to do but requested defendant to make the repairs, which defendant refused to do; that thereupon the defendant told Marks he would vacate the premises and Marks replied, "Go ahead," and that, acting on this, the defendant vacated the premises on December 28, 1928, having paid his rent for December.

The evidence further shows that on February 25, 1926, the defendant-tenant and the then landlord, Rice, entered into a written agreement by which the original lease was modified so that the tenant would pay monthly to the landlord an amount sufficient to pay all taxes and insurance and other charges levied against the property, instead of the tenant paying the taxes, insurance and other charges annually and submitting receipted bills to the landlord; that in accordance with the modification, the tenant paid in

building; that if there were any surplus remaining, it should be paid by the landlord to the tenant.

The tenant entered into possession and made all the payments and performed all of the agreements as required by the lease. On November 16, 1928, the landlord assigned all of its interest in the lease to Otto Arnold Rice, and then on December 31, 1928, assigned all his interest to Morris Dickman, and the latter on January 31, 1929, assigned all his interest in the lease to the plaintiff, the Kerman Trust and Savings Bank, as trustee, under Trust No. 1327.

The evidence shows that the premises were insured to nine buildings, but the number or character of them does not appear; that on December 22rd a fire broke out and destroyed three of the buildings so that they were untenantable, and on that day the tenant-lessee notified Arnold Rice, of Rice & Company, with whom he had all dealings with reference to the property, of the fire; that representatives came to the premises and saw what damage had been done; that the lessee then told Rice to have the things repaired, which Rice refused to do but requested defendant to make the repairs, which defendant refused to do; that thereupon the defendant told Rice he would release the premises and Rice replied, "Go ahead," and that, acting on this, the defendant vacated the premises on December 23, 1929, having put his rent for December, 1929.

The evidence further shows that on February 3, 1930, the defendant-lessee and the Kerman Landlord, Rice, entered into a written agreement by which the original lease was [illegible] so that the tenant could pay monthly to the landlord an amount sufficient to pay all taxes and insurance and other charges levied against the property, instead of the tenant paying the taxes, insurance and other charges annually and submitting receipts thereto to the landlord; that in accordance with the modification, the tenant paid in

addition to the rent of $1,000 per month, $308.34 monthly to Marks & Company, the landlord's agent, to cover such charges.

The evidence further shows that the defendant-tenant sublet the basement of the premises known as 511, 513 Ashland avenue, as he was apparently authorized to do, and that the subtenant vacated on February 5, 1929. Evidence was offered by the defendant tending to show that at the time of the fire he told the subtenant in the presence of Marks, the agent, that the subtenant must vacate unless he made other arrangements with Marks, but this evidence was ruled out.

The defendant contends that the judgment is void and should be reversed because the law does not authorize a judgment by confession for an uncertain or unliquidated amount, and that since the lease in the instant case provided that if the tenant did not pay all taxes and assessments levied against the property, including insurance premiums, these amounts should be considered additional rent for which judgment might be confessed; therefore the amount was uncertain and unliquidated and no judgment by confession could be entered. In support of this the case of Little v. Dyer, 138 Ill. 272, is relied upon. We think that case is not in point. The lease involved in that case contained provisions which were somewhat similar to the provisions in the lease before us, and judgment by confession was entered not only for the rent reserved but for taxes and other charges; and it was held that this could not be done because the amount was unliquidated. Afterwards, in the case of Fortune v. Bartolomei, 164 Ill. 51, where a lease contained similar provisions, it was held that the judgment by confession might be entered for the rent specified in the lease which was certain and liquidated.

In the instant case judgment was confessed for $1,000, being rent for the month of January. It is clear that the Little

addition to the rent of $1,000 per month, [illegible] monthly to Earle & Company, the landlord's agent, to cover such charges.

The evidence further shows that the defendant-tenant [illegible] subject the basement of the premises known as 311, 113 Ashland avenue, as he was apparently authorized to do, and that the sub-tenant vacated on February 3, 1970. Evidence was offered by the defendant tending to show that at the time of the fire he held the substement in the presence of Earle, the agent, that the subtenant must vacate unless he made other arrangements with Earle, but this evidence was ruled out.

The defendant contends that the judgment in void and should be reversed because the law does not authorize a judgment by confession for an uncertain or unliquidated amount, and that since the issue in the instant case provided that if the tenant did not pay all taxes and assessments levied against the property, including insurance premiums, these sums should be considered additional rent for which judgment might be confessed; therefore the amount was uncertain and unliquidated and no judgment by confession could be entered. In support of this the case of Little v. Dyer, 124 Ill. 272, is relied upon. We think that case is not in point. The issue involved in that case concerned provisions which were somewhat similar to the provisions in the issue before us, and judgment by confession was entered not only for the rent reserved but for taxes and other charges, and it was held that this could not be done because the amount was unliquidated.

Afterwards, in the case of Jordan v. Bernstein, 164 Ill. [illegible], where a lease contained similar provisions, it was held that judgment by confession might be entered for the rent specified in the lease which was certain and liquidated.

In the instant case judgment was confessed for [illegible], being rent for the month of January. It is clear that [illegible]

case does not apply but that the Fortune case is controlling here.

Under the terms of the lease the tenant deposited with the landlord $2,000 as security for the performance of the terms and conditions of the lease, which further provided that "In the event that the lessee shall default or fail or refuse to perform the terms of this lease, the lessor shall thereupon have the right to terminate the same and retain the sum of Two Thousand and no/100 Dollars ($2,000.00) and interest thereon as liquidated damages;" and the argument of the defendant seems to be that since the landlord has retained this $2,000, it must be presumed that this was retained as liquidated damages and that no further recovery can be had. It is obvious that this contention is unsound. By the provision of the lease, above quoted, it is clear that the right to terminate the lease and retain the $2,000 was optional with the landlord, and there is no evidence that it has exercised this option, but on the contrary the fact that it is prosecuting this suit would indicate that it considered the lease to be still in force and effect.

The defendant further contends that under the lease, as modified, it was the duty of the landlord to repair the damages done by the fire out of the insurance; that since the property was not insured by the landlord, and since the landlord refused to repair the damages, and since the tenant advised the landlord that on account of three of the buildings being untenantable he would vacate and this was acquiesced in by the landlord and the tenant vacated, that the judgment is wrong and should be reversed. In reply to this contention, the only argument made by counsel for plaintiff is that the evidence fails to show that Marks, who, it was claimed, authorized the vacation of the premises, was the agent of the plaintiff in this respect; that the evidence shows that he was a mere renting agent and therefore not authorized to terminate the

case does not apply but that the Martinez case is controlling here.

Under the terms of the lease the tenant deposited with the landlord $2,000 as security for the performance of the terms and conditions of the lease, which further provided that "in the event that the lessee shall default or fail or refuse to perform the terms of this lease, the lessor shall thereupon have the right to terminate the same and retain the sum of Two Thousand and no/100 Dollars ($2,000.00) and interest thereon as liquidated damages;" and the argument of the defendant seems to be that since the landlord has retained this $2,000, it must be presumed that this was retained as liquidated damages and that no further recovery can be had. It is obvious that this construction is unsound. By the provision of the lease, above quoted, it is clear that the right to terminate the lease and retain the $2,000 was optional with the landlord, and there is no evidence that it has exercised this option, but on the contrary the fact that it is prosecuting this suit would indicate that it considered the lease to be still in force and effect.

The defendant further contends that under the lease, as modified, it was the duty of the landlord to repair the damages done by the fire out of the insurance; that since the property was not insured by the landlord, and since the landlord refused to repair the damage, and since the tenant advised the landlord that on account of three of the buildings being unmerchantable he would vacate and this was acquiesced in by the landlord and the tenant vacated, that the judgment is wrong and should be reversed. In reply to this contention, the only argument made by counsel for plaintiff is that the evidence fails to show that Mrs. [illegible] claimed, authorized the vacation of the premises, nor does it [illegible] the plaintiff in this respect; that the evidence shows that Mr. [illegible] were renting agent and therefore not authorized to terminate the

lease.

We think the evidence in the record was not fully brought out and this resulted in part at least from the almost constant technical objections by counsel for plaintiff. Obviously, the plaintiff, being a corporation, must act through an agent. Too often, we think, court and counsel take a view that is entirely too technical when it is sought to adduce facts where the question of agency is involved. Roy Iverson Co. v. U. S. Lloyds, Inc., 251 Ill. App. 150; Meyer v. Iowa Mutual Liability Ins. Co., 240 Ill. App. 431; Pike v. Engler, 211 Ill. App. 520. We think there ought to be a retrial of this case where all of the facts should be fully brought out showing Marks' connection with the property and his dealings with the defendant. Obviously, if it was the duty of the plaintiff to restore the three buildings so as to render them tenantable, and he failed to do so, this would warrant the tenant in vacating the premises. Gibbons v. Hoefeld, 299 Ill. 455. But plaintiff contends that the premises were not vacated because the undisputed evidence is that the subtenant remained in possession of the premises during the month of January and up to February 5th. If the evidence disclosed that the subtenant was making ready to leave and did so with reasonable expedition, it might be that he was warranted in leaving on the 5th of February. Where the landlord breaches the terms and conditions of the lease which authorize the tenant to vacate, the latter is not required to do so at once but is entitled to a reasonable time. Kinn v. Slyde, 246 Ill. App. 26. And if the defendant-tenant was deprived of the use of three of the buildings by the wrong of the landlord, then no rent was due and payable for any of the premises although part was occupied by the tenant. Carlson v. Levinson, 228 Ill. App. 104.

We think the court erred in instructing a verdict in favor of the plaintiff because there was some evidence to the

leases.

We think the evidence in the record was not fully brought out and this resulted in part at least from the almost constant technical objections by counsel for plaintiff. Obviously, the plaintiff, being a corporation, must act through an agent. Too often, we think, courts and counsel take a view that is unduly too technical when it is sought to adduce facts where the question of agency is involved. Joy Jackson Co. v. G. Jaber & Co., 73 Ill. App. 180; Mayer v. Iowa Mutual Liability Ins., 24 Ill. App. 431; Pike v. Hanley, 211 Ill. App. 52. We think there cannot be a reversal of this case where all of the facts show that the plaintiff had dealings and connection with the property and its dealings with the defendant. Obviously, it was the duty of the plaintiff to restore the three buildings to as to render them habitable, and he failed to do so, this would warrant the tenant in vacating the premises. Gibbons v. Hopkins, 149 Ill. 499. But it clearly appears that the premises were not vacated because the inadequate evidence is that the evidence remained in possession of the premises during the month of January and up to February 1st. If the evidence disclosed that the defendant [illegible] to leave and did so with reason [illegible] was warranted in leaving on the 1st of January. [illegible] Lord breaches the terms and conditions of the lease [illegible] the tenant to vacate, and [illegible] but is entitled to a reasonable time. [illegible], 149 Ill. App. 86. And if the defendant-tenant was deprived [illegible] of the buildings by the wrong of the landlord, [illegible] and payable for any of the premises [illegible] the tenant. Carlson v. Levitsky, 144 Ill. App. 1.

We think the court erred in [illegible] in favor of the plaintiff because there was some evidence to the

effect that the lease was terminated by the oral agreement of the parties. On the retrial all of the facts can be adduced.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

effect that the lease was terminated by the oral agreement of the parties. On the retrial all of the facts can be adduced.

The judgment of the municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McGoorty, P. J., and Matchett, J., concur.

33559

NATHAN SOLOMON,
Appellant,

vs.

M. GARBER, Trading as
M. GARBER COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $989.17 with interest from April 16, 1927. There was a verdict and judgment in defendant's favor and plaintiff appeals. The record discloses that plaintiff's place of business was located in Chicago where he was engaged in selling millinery. Defendant was engaged in the manufacture of millinery in New York City. An agreement was entered into between the parties whereby plaintiff agreed to sell goods for defendant upon which he was to receive a commission of 7½ per cent. Plaintiff from time to time sold goods for the defendant and was paid the agreed commission. The basis of plaintiff's claim in the instant case, as stated by his counsel, is that "defendant promised plaintiff a commission of seven and one-half per cent on all sales of millinery goods made direct by defendant, with or without plaintiff's solicitation or intervention, to certain parties residing or having their principal places of business in or about Chicago;" that the defendant had sold between June 20, 1925, and April 16, 1927, the following goods: Chicago Mail Order Company, $10,000; United Millinery Company, $189; Montgomery Ward & Company, $3,000; total $13,189, for which sales plaintiff had received no commission.

Plaintiff says that he did not make these sales but claims that under his oral agreement with defendant he was entitled to a commission of 7½ per cent. Defendant's position was that plaintiff was to receive commissions only on sales that he made

NATHAN COLEMAN,
Appellant,

vs.

M. GARNER, Trading as
M. GARNER COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GARDNER DELIVERED THE OPINION OF THE COURT.

"Liability through suit against the defendant to recover $308.17 with interest from April 10, 19 [illegible]. There was a verdict and judgment in defendant's favor and plaintiff appeals. The record discloses that plaintiff's place of business was located in Chicago where he was engaged in selling, delivering, installing and repairing in the manufacture of mattresses [illegible]. A statement was entered into between the parties whereby plaintiff agreed to sell goods for defendant upon [illegible] to receive a commission of 7½ per cent. Plaintiff [illegible] time to time sold [illegible] the defendant and was paid the [illegible] commission. The basis of plaintiff's claim is the [illegible], as stated by his counsel, is that "defendant promised [illegible] a commission of seven and one-half per cent on all sales of mattresses made direct by defendant, with or without plaintiff's solicitation or participation, to certain [illegible] or [illegible] regular customers, [illegible] overlapping in or about [illegible] June 30, 1927, and April 10, 1927, [illegible] Mattress Company, [illegible]; [illegible] Company [illegible], total $[illegible], for which plaintiff had received no commission.

Plaintiff [illegible] claim that under his [illegible] entitled to a commission of 7½ per cent. Defendant's position was that plaintiff was to receive commissions only on sales [illegible]

and on re-orders that plaintiff's customers might send to the defendant.

At the conclusion of the evidence the court instructed the jury. No complaint is made that the instructions were not accurate, so we must assume that the question in dispute between the parties was properly submitted to the jury. They found the issues in favor of the defendant.

Two witnesses testified on behalf of plaintiff and considerable correspondence was introduced in evidence. The defendant read the depositions of three witnesses and certain documentary evidence introduced. Plaintiff contends that the court erred in overruling his objection to the depositions - that they had not been filed before they were read - and the further argument is made that they have never been filed.

The record discloses that defendant took the depositions of witnesses in New York City on February 15, 1929, and on March 20th the case went to trial. On the next day, when plaintiff closed his case and defendant offered to read the depositions, objection was made by counsel for plaintiff. It appears that after the depositions were taken in New York they were mailed to counsel for defendant instead of to the clerk of the Municipal court; that some two weeks or ten days before the trial the matter came up in court, when counsel for the defendant stated he would request a continuance so that he could return the depositions to the commissioner in New York, who would then send them to the clerk of the Municipal court. Counsel for plaintiff was given a copy of the depositions, but how long before the trial does not definitely appear. When objection was made to the reading of the depositions, counsel for defendant stated the foregoing facts as to the taking and returning of the depositions; that he did not send the depositions back because counsel for plaintiff stated some ten days before the actual trial he would not raise the

and on re-direct that plaintiff's witnesses testified and to the defendant.

At the conclusion of the evidence the court instructed the jury. No complaint is made that the instructions were not accurate, so we must assume that the question in dispute between the parties was properly submitted to the jury. They found the issues in favor of the defendant.

Two witnesses testified on behalf of plaintiff and considerable controversy was injected in evidence. The defendant read the depositions of these witnesses and certain documentary evidence introduced. Plaintiff contends that the court erred in overruling his objection to the depositions - that they had not been filed before they were read - and the trial judge stated in made that they have never been filed.

The record indicates that defendant took the deposition of witnesses in New York City on December 14, 1971, and on March 20th the case went to trial. On the next day, were dismissed closed his case and defendant attempt to read the depositions, objection was made by counsel for plaintiff. It appears that after the depositions were taken in New York they were mailed to counsel for defendant instead of to the clerk of the municipal court; that some two weeks or two days before the trial the matter came up in court, when counsel for defendant argued that he would request a continuance to file the only return of depositions in the commissioner in New York, and would have very [illegible] to clerk of the municipal court. Counsel for plaintiff was given a copy of the depositions, but now claims that trial judge did definitely agree. When objection was made to the reading of the depositions, counsel for [illegible] to the taking and returning of the depositions. The judge nevertheless read the depositions back because counsel for plaintiff asked some two days before the noted trial he would not raise the

point that they had been sent to counsel for defendant instead of to the clerk of the court. Continuing, counsel for defendant stated: "So I did not send them back to have them sent direct to the clerk. Counsel has had a copy of them. He said right in court before your Honor he was not going to raise any objection to their being sent to me rather than direct to the clerk." Counsel for Plaintiff: "Yes, certainly, I did not raise that objection, but they ought to be filed in this case." Thereupon, counsel for defendant said he was filing them at that time, and an order was then entered of record permitting this to be done instanter. In view of the record we think it obvious that plaintiff's objection is entirely technical and without merit.

The depositions were read in evidence and the objection that the certificates of the commissioner who took the depositions were not read is entirely without merit. These matters should never be read to a jury. If there was any objection that the certificates were not in proper form, it should have been pointed out.

Counsel for plaintiff further contends that the court should have directed a verdict in plaintiff's favor as requested, because plaintiff made out a prima facie case and no competent evidence was offered by defendant. Plaintiff testified that the oral agreement between the parties was entered into in New York City, therefore his claim depended upon an express contract. Plaintiff's testimony was to the effect that he was to be paid 7½ per cent on all goods sold by him and on all purchases made by mail order houses in Chicago where the goods were shipped by the defendant into Chicago. Witnesses for the defendant gave testimony to the effect that plaintiff was to receive a commission only on goods he sold and on re-orders given by plaintiff's customers, and that defendant refused to give plaintiff any exclusive territory.

We think that the terms of the contract entered into between the parties were properly for the jury and that the court

point that they had been sent to counsel for defendant instead of to the clerk of the court. Continuing, counsel for defendant stated: "So I did not send them because they were sent direct to the clerk. Counsel has had a copy of them. He had right in court before your Honor [illegible] to raise any objection to their being sent to me rather than direct to the clerk." Counsel for plaintiff: "Yes, certainly, I did not raise that objection, but they ought to be filed in this case." Afterwards, counsel for defendant said he was filing some of them there, and an order was then entered of record directing that it be done instanter. In view of the record [illegible] plaintiff's objection is entirely technical and without merit.

The depositions were read in evidence and the suggestion that the certificates of the stenographer [illegible] were not read is entirely without merit. [illegible] ought never be read to a jury. [illegible] objection that the certificates were not in proper form, [illegible] have been pointed out.

Counsel for plaintiff further contends that the court should have directed a verdict in plaintiff's favor as requested, because plaintiff made out a prima facie case and no competent evidence was offered by defendant. Plaintiff contends that the oral agreement between the parties was [illegible], therefore all oral [illegible] evidence [illegible]. Plaintiff's testimony was [illegible] sent his goods [illegible] by him and on [illegible] houses in Chicago, where the goods were ordered [illegible] into Chicago. Witnesses for the defendant gave testimony to the effect that plaintiff had [illegible] a commission [illegible] as well as [illegible] plaintiff's [illegible] defendant refused to give plaintiff [illegible].

We think that the issues [illegible] between the parties were properly for the jury and [illegible]

did not err in refusing to direct a verdict in favor of plaintiff.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McBurely, P. J., and Matchett, J., concur.

did not err in refusing to direct a verdict in favor of plaintiff.

The judgment of the municipal court is affirmed.

AFFIRMED.

McCurdy, P. J., and Kossmann, J., concur.

33604

WILLIAM H. CAMPBELL,
Complainant,

vs.

CARL A. STARCK,
Defendant.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

vs.

In Re CONTEMPT OF CARL A. STRACK,
Appellant.

255 I.A. 632

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Carl A. Starck, the defendant, seeks to reverse an order of the Superior court of Cook county wherein he was adjudged to be in contempt of court for violating an injunction of that court. The court ordered that for such contempt the defendant be committed to the common jail of Cook county for a period of five days and pay a fine of $750.

The record discloses that on October 23, 1923, a decree was entered restraining the defendant, Carl A. Starck, from practicing medicine or surgery and enjoining him from being connected with or operating a hospital within sixteen miles of the village of Palatine, Illinois, for a period of five years from June 29, 1926. This decree appears to have been approved by counsel for the complainant in that suit and counsel for defendant. Afterwards, on December 18, 1923, the complainant in the suit, in whose favor the decree was entered, filed a petition in which it was alleged that the defendant had violated the injunctional decree and specific instances were set forth. The petition was verified. A rule was entered on the defendant to answer the petition and he filed his answer. The matter was referred to a master in chancery to take

33604

WILLIAM R. CARPENTER,
Complainant,

vs.

CARL A. STARCK,
Defendant.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

vs.

In Re CONTEMPT OF CARL A. STARCK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

Mr. Carl A. Starck, the defendant, was found guilty of contempt of court by the Municipal Court of Cook County and sentenced to a term of six months in the county jail. The court entered an order that a bond posted by the defendant be conditioned on the defendant's appearance in court at a period of five days after the date of the order.

The record discloses that on October 24, 1949, a decree was entered terminating the marriage, Carl A. Starck, from previous proceedings relating to alimony and maintenance, which decree was entered on the 24th day of October, 1949. Thereafter, on December 14, 1949, the complainant in the suit, [illegible] the decree was entered, filed a petition in which it was alleged that the defendant had violated the injunction [illegible] in the decree. The petition was verified. [illegible] entered on the defendant to answer the petition and [illegible] answer. The matter was referred to a master in chancery to take

the proofs and make up his report with his conclusions. The complainant appeared before the master and introduced considerable evidence. The defendant offered no defense. The master made up his report and made specific findings to the effect that the defendant had wilfully violated the terms of the injunction. Objections were filed, some of which were sustained and some overruled. Afterwards, on the coming in of the master's report, the defendant filed exceptions and on March 16th the court entered an order overruling the exceptions and approving the master's report wherein specific findings were made to the effect that the injunction had been violated by the defendant; and it was ordered that on account of such violation the defendant be committed to the common jail of Cook county for a period of sixty days. Three days afterwards the defendant moved to vacate the order adjudging him in contempt. Afterwards the court entered the order appealed from, which overruled the exceptions to the master's report and approved it and specific findings are made of facts showing the violation of the injunction by the defendant; in this order defendant was sentenced to five days in the common jail of Cook county and a fine of $750 imposed. It is this order that the defendant seeks to reverse.

The defendant contends that "the complainant did not come into the trial court with clean hands," and he then attempts to point out some inconsistencies between the exhibit to the bill of complaint, which was the contract entered into between the complainant and the defendant in the chancery suit, and another exhibit which it is said is inconsistent with the first exhibit mentioned. The second exhibit describes certain properties as lot 4 and lot 8, and the argument is, as stated by counsel for defendant, "The mistake so obvious in the face of the record, in that lot four and lot eight not possibly lying alongside, it is sought by the defendant through the court's decree to confirm

the proofs and make up his report with his findings. The complainant appeared before the master and introduced considerable evidence. The defendant offered no defense. The master made in his report and made specific findings to the effect that the defendant had willfully violated the terms of the injunction. Objections were filed, some of which were sustained and some overruled. Afterwards, on the coming in of the master's report, the defendant filed exceptions and on March 16th the court entered an order overruling the exceptions and approving the master's report wherein specific findings were made to the effect that the injunction had been violated by the defendant; and it was ordered that on account of such violation the defendant be committed to the common jail of Cook county for a period of sixty days. Three days afterwards the defendant moved to vacate the order adjudging him in contempt. Afterwards the court entered the order complained of, which overruled the exceptions to the master's report and approved it and specific findings were made of facts showing the wilfulness of the violation by the defendant; in this order defendant was sentenced to five days in the common jail as for contempt of the injunction imposed. It is this order that the defendant seeks to reverse.

The latter set forth that "the complainant did not come into the court [illegible] with clean hands, [illegible] to point out some inconsistencies in the evidence, the validity of the [illegible] of complaint, which was [illegible] for [illegible] complainant and the [illegible] of [illegible] and [illegible] exhibits which it is said to [illegible] which [illegible] mentioned. The second exhibit described certain [illegible] as lot 4 and lot 5, and the [illegible] defendant, "the statute to which [illegible] that lot four and lot eight are possibly [illegible], it is sought by the defendant through the [illegible]

the error and secure for himself an unfair and unlawful advantage, unsupported by any evidence." This argument is incoherent. If defendant had any complaint to make about the decree, he should have appealed from it. The record discloses that he not only had no complaint to make but that his counsel O. K'd. it.

The next point made by the defendant is that the acts complained of in the petition were not wilfully contemptuous. The substance of the contempt of which the defendant was found guilty was that he had practiced medicine after the decree restraining him from doing so was entered. The argument of counsel under this point is to the effect that the evidence taken before the master shows that there was no wilful violation of the injunction. Nowhere in the argument is any reference made to the abstract of record where the evidence complained of is pointed out. Obviously it is not the duty of this court to search through the record to see whether the argument is borne out by the record. However, we have considered the evidence in the record and are clear that the finding of the master, approved by the chancellor, is fully warranted by the evidence.

The defendant next contends that the sentence of the court "was contrary to the law and the evidence," and in support of this it is said that the defendant, being a physician,"stands as one close to the homes and hearts of the community," and that it is therefore obvious that the imposition of the jail sentence and the fine of $750 is unduly severe. This is all that is said in support of this contention. The record shows that the bill for injunction was filed January 17, 1927, and on February 1st an order was entered enjoining the defendant, pending the hearing, from practicing medicine or surgery or locating a hospital within sixteen miles of the village of Palatine. More than a year afterwards, on October 23, 1928, after the case was heard before the

the error and secure for himself a unlike and unlawful situation, unsupported by any evidence." [illegible] argument is immaterial. If defendant had any complaint to make [illegible] have appealed from it. The record discloses [illegible] had no complaint to make [illegible] 1. [illegible]

The next point made by the defendant [illegible] complained of in the petition were not without consequence. The substance of the contract [illegible] was that he was [illegible] medicine after [illegible] him from [illegible] no [illegible]. [illegible] point is [illegible] above [illegible] where in the [illegible] treated were the [illegible] it is [illegible] not [illegible] have [illegible] tinting [illegible] vitiated by [illegible].

[illegible] court [illegible] of this [illegible] it is [illegible] and [illegible] in [illegible] for [illegible] other [illegible] from [illegible] water [illegible] wards, on October 24, 1921, after [illegible]

master a final decree was entered in the chancery suit perpetually enjoining the defendant; and the evidence taken before the master and the report of the master and the finding in the decree are that the defendant had continually and wilfully violated both the preliminary and the final injunctional orders. The evidence shows that, and the finding is that the violation was willful.

Under these circumstances we think we would not be warranted in disturbing the order appealed from. The order of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

master a final decree was entered in the Chancery Court protectively enjoining the defendant, and the evidence later omitted the master and the report of the master and the finding in the decree are that the testator had continuously and actually violated the testimony and the final adjudication decree. The evidence shows that, and the finding is that the testator was guilty.

Later to be otherwise by like an [illegible] warranted in electrocuting the entire amount of [illegible]. The order of the Chancery Court of [illegible] is affirmed.

AFFIRMED.

Rehnquist, C. J., and Blackmun, J., concur.

33613

CENTRAL SCIENTIFIC COMPANY, a Corporation,
Appellant,

vs.

ROGERS PARK HOSPITAL, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 632

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $932.73, being the balance of the purchase price claimed by plaintiff to be due for laboratory equipment and chemicals sold to the defendant. The case was tried before the court without a jury and at the conclusion of all the evidence there was a finding and judgment in the defendant's favor and plaintiff appeals.

The record discloses that in December, 1927, Dr. Roman, who was connected with the defendant hospital, called at plaintiff's place of business and bought from it equipment and chemicals for a laboratory to be installed in the defendant's hospital at 6920 North Clark street, Chicago. At that time Dr. Roman selected all of the equipment, which consisted of several articles, and they were shortly thereafter delivered to the hospital where they were installed and used until some time in May, 1928. The purchase price was about $1150, and it was agreed between plaintiff and Dr. Roman that the hospital should give its eleven notes for $100 each, maturing monthly, and the small balance was paid in cash by Dr. Roman. In January, 1928, eleven notes were signed "Rogers Park Hospital by A. M. Roman" and delivered to plaintiff. In December, prior to the execution of the notes, the equipment was delivered to the hospital and there installed. In May, 1928, it appears that the hospital officials learned that Roman was not a doctor and he was severing his connection with

32613

CENTRAL SCIENTIFIC COMPANY, a Corporation, Appellant,	
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ROGERS PARK HOSPITAL, a Corporation, Appellee.	

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $8932.75, being the balance of the purchase price claimed by plaintiff to be due for laboratory equipment and chemicals sold to the defendant. The case was tried before the court without a jury and at the conclusion of all the evidence there was a finding and judgment in the municipal court for plaintiff appeals.

The record discloses that in December, 1927, Dr. Hamon, who was connected with the defendant hospital, called at plaintiff's place of business and bought from it equipment and chemicals for a laboratory to be installed in the defendant's hospital at 6820 North Clark street, Chicago. At that time Dr. Hamon selected all of the equipment, which consisted of several articles, and they were shortly thereafter delivered to the hospital where they were installed and used until some time in May, 1928. The purchase price was about $1150, and it was agreed between plaintiff and Dr. Hamon that the hospital should give its eleven notes for $100 each, maturing monthly, and the small balance was paid in cash by Dr. Hamon. In January, 1928, eleven notes were signed "Rogers Park Hospital by A. M. Hamon" and delivered to plaintiff. In December, prior to the execution of the notes, the equipment was delivered to the hospital and there installed. In May, 1928, it appears that the hospital officials learned that Hamon was not a doctor and he was securing his commission in

the hospital, and at that time the defendant refused to pay for the laboratory equipment on the ground that it was not purchased by the hospital but by Dr. Roman individually. Thereafter the instant suit was brought, not upon the notes but upon the open account, with the result as above stated.

Plaintiff contends that the judgment is wrong and should be reversed because at the time of the purchase and sale of the laboratory equipment it dealt with Dr. Roman as a representative of the hospital; that it afterwards delivered the equipment to the hospital where it was installed and used; that it billed the hospital for the equipment and received no complaint from the defendant, and therefore the defendant is estopped to deny that the sale was made to it.

On the other hand, the defendant's position is that all of the evidence shows that Dr. Roman was not authorized by it to make the purchase, and that he bought it for himself; that plaintiff, in dealing with Dr. Roman on the theory that he was the agent of the hospital, did so at its peril under the well established principle of law that it was the duty of plaintiff, before extending credit, to ascertain Roman's authority, if any, and not having done so, and the purchase having been made by Roman for himself, the judgment should be affirmed.

The evidence is to the effect that in December, 1927, Dr. Roman called at plaintiff's place of business with a view to purchasing laboratory equipment and chemicals to be installed in the Rogers Park Hospital, a seven story building which had been recently completed, with a capacity of 116 beds, and which was then being conducted as a hospital; that Dr. Roman stated that he was a brother-in-law of Dr. Mackler, the president of the defendant corporation; that at that time it was explained to Dr. Roman that where such equipment was bought by a hospital or simi-

the hospital, and at that time the defendant refused to pay for the laboratory equipment on the ground that it was not purchased by the hospital but by Dr. Hosman individually. Thereafter the instant suit was brought, not upon the notes but upon the open account, with the result as above stated.

Plaintiff contends that the judgment is wrong and should be reversed because at the time of the purchase and sale of the laboratory equipment it dealt with Dr. Hosman as a representative of the hospital; that it afterwards delivered the equipment to the hospital where it was installed and used; that it billed the hospital for the equipment and received no complaint from the defendant, and therefore the defendant is estopped to deny that the sale was made to it.

On the other hand, the defendant's position is that all of the evidence proves that Dr. Hosman was not authorized by it to make the purchase, and that he bought it for himself; that plaintiff, in dealing with Dr. Hosman on the theory that he was the agent of the hospital, did so at its peril under the well established principle of law that it was the duty of plaintiff, before extending credit, to ascertain Hosman's authority, if any, and not having done so, and the purchase having been made by Hosman for himself, the judgment should be affirmed.

The evidence in the record shows that in December, 1927, Dr. Hosman called at plaintiff's office of business with a view to purchasing laboratory equipment and materials to be installed in the Rogers Park Hospital, a seven story building which had been recently completed, with a capacity of 110 beds, and which was then being conducted as a hospital; that Dr. Hosman stated that he was a brother-in-law of Dr. Wolfer, one of the officers of the defendant corporation; that at that time it was contemplated by Dr. Hosman that where such equipment was bought, it was not that of sui-

lar institution, there would be a discount of ten per cent, while if purchased by an individual there would be no discount. Dr. Roman stated the hospital was owned by the family - that he and Dr. Mackler owned the hospital, which was not incorporated, and that he was authorized to buy the equipment for the hospital. The various articles of equipment were selected and afterwards the financial standing of Dr. Roman, and probably the Rogers Park Hospital, was investigated by the plaintiff, inquiries made of the Dun Mercantile Agency and a bank, with the result that a favorable report was obtained by plaintiff. Afterwards the equipment was sent out to the hospital and there delivered, most of it being receipted for by Dr. Roman, who was in charge of the laboratory then being installed. Some of the equipment was sent to the hospital by automobile, some by parcel post and all of it was billed to the Rogers Park Hospital, the defendant. The evidence also shows that the equipment was installed and the laboratory operated by Dr. Roman in connection with the hospital, and that bills were sent by plaintiff to the defendant hospital in reference to the transaction and that defendant's officials knew of this fact but made no complaint to plaintiff or to any one else so far as the record discloses. There was some evidence that Dr. Roman conducted the laboratory in his own behalf and made charges to the hospital for services rendered by him, but the evidence is rather meager. However, there is no intimation that plaintiff had any notice or knowledge of any arrangement between the hospital and Dr. Roman in regard to the laboratory. There is other evidence in the record, which we think unnecessary to advert to here, all indicating that the defendant hospital knew that plaintiff understood that it was dealing with the hospital and not with Dr. Roman individually.

for institution, there would be a discount of ten per cent, while if purchased by an individual there would be no discount. Dr. Hamman stated the hospital was owned by the family - that he and Dr. Kuehler owned the hospital, which was not incorporated, and that he was authorized to buy the equipment for the hospital. The various articles of equipment were selected and determine the financial standing of Dr. Hamman, and probably the Rogers Park hospital, was investigated by the plaintiff. Inquiries made of the Dun Mercantile Agency and a bank, with the result that a favorable report was obtained by plaintiff. Although the equipment was sent out to the hospital and there delivered, was of it being receipted for by Dr. Hamman, who was in charge of the laboratory then being installed. Some of the equipment was sent to the hospital by automobile, some by express and all of it was billed to the Rogers Park hospital, the defendant. The evidence also shows that the equipment was installed and the laboratory operated by Dr. Hamman in connection with the hospital, and that bills were sent by plaintiff to the defendant hospital in reference to the transaction and that defendant's officials knew of this fact but made no complaint to plaintiff or to any one else so far as the record discloses. There was some evidence that Dr. Hamman conducted the laboratory in his own behalf and made charges to the hospital for services rendered by him, but the evidence is rather meager. However, there is no intimation that plaintiff had any notice or knowledge of any arrangement between the hospital and Dr. Hamman in regard to the laboratory. There is rather evidence in the record, which we think unnecessary to advert to here, all indicating that the defendant hospital knew that plaintiff furnished that it was dealing with the hospital and not with Dr. Hamman individually.

In these circumstances we think the defendant ought not now to be heard to say that the equipment and chemicals were purchased by Dr. Roman individually and that it cannot be held liable. 1 Mechem on Agency (2nd ed.), secs. 245, 246; Thurber & Co. v. Anderson, 88 Ill. 167; Faber-Nusser Co. v. DeeClay Co., 291 Ill. 240. In the Anderson case suit was brought for a bill of goods shipped by the plaintiff to the defendant's address on an order given by the defendant's son. The son received the goods and made use of them himself without the knowledge of the father and the father was held liable. The father denied that the son had any authority to purchase the goods and further denied that the son had purchased the goods, but the court said: "but it does not appear that appellant (plaintiff) had any reason to suspect that the goods were not ordered by him. (the father.)"

The judgment of the Municipal court of Chicago is reversed with a finding of fact, but since there was no jury and the overwhelming weight of the evidence shows that defendant is liable, the cause will not be remanded but judgment will be entered in this court in favor of plaintiff and against defendant for $932.73.

JUDGMENT REVERSED WITH A FINDING OF FACT
AND JUDGMENT ENTERED IN THIS COURT.

McSurely, P. J., and Matchett, J., concur.

FINDING OF FACT.

We find as an ultimate fact that the defendant is estopped to deny liability in this case.

33638

DEERRY & CO., a Corporation,
Appellant,

vs.

MICHIGAN CENTRAL RAILROAD
COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $404.50 claimed to be damages it had sustained by reason of the failure of the defendant to deliver two cars of cucumbers on the 12th street team track, at Detroit, Michigan, within the reasonable and customary time. The case was tried before the court without a jury and there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that two carloads of cucumbers were transported from Alabama to Detroit, placed upon defendant's Dock team track, and plaintiff notified of the arrival of the cucumbers; that two days later the defendant placed the two cars upon its 12th street team track in Detroit, where the cucumbers were received by plaintiff. It was stipulated that during the two days time the market for cucumbers dropped so that the value of them was $404.50 less than if there had not been the two days delay.

The bills of lading under which the two cars moved provided that the defendant railroad shouhd carry the cucumbers to Detroit "to its usual place of delivery," and plaintiff's position was and is that the usual place of delivery was on the 12th street track and not on the dock team track; while the position of the defendant is that the usual place of delivery, as mentioned in the bills of lading, meant either of the two tracks. This was the sole question in the case.

DELANEY & CO., a Corporation,
Appellant,

vs.

MICHIGAN CENTRAL RAILROAD
COMPANY, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $604.80 claimed to be damages it had sustained by reason of the failure of the defendant to deliver two cars of cucumbers on the 12th street team track, at Detroit, Michigan, within the reasonable and customary time. The case was tried before the court without a jury and there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that two carloads of cucumbers were transported from Alabama to Detroit, placed upon defendant's Dock team track, and duly notified of the arrival of the cucumbers; that two days later the defendant placed the two cars upon its 12th street team track in Detroit, where the cucumbers were received by plaintiff. It was established that during the two days time the market for cucumbers dropped so that the value of them was $604.80 less than if there had not been the two days delay.

The bills of lading under which the two cars moved provided that the defendant railroad should carry the cucumbers to Detroit "to its usual place of delivery," and the plaintiff's position was and is that the usual place of delivery was on the 12th street track and not on the dock team track; while the position of the defendant is that the usual place of delivery, as contained in the bills of lading, meant either of the two tracks. This was the sole question in the case.

The undisputed evidence also is that it was but about two blocks from the place where the cars were placed on the Dock team track to the place where they were two days later delivered on the 12th street track. Two witnesses who lived in Chicago gave testimony to the effect that the usual place of delivering produce such as the cucumbers in question, in Detroit, by the defendant railroad was at the 12th street Team track. But a careful reading of the testimony of these two witnesses discloses the fact that they had little information on the subject and their testimony is unsatisfactory. A witness for the defendant who lived in Detroit and who had been an adjuster and special investigator for the Claim department of the defendant railroad at Detroit for a number of years, testified that the usual place for delivery of such produce was at either of the two yards, and that about the same number of cars were delivered at each track.

The court in deciding the case gave more credence to the testimony of the latter witness than he did to the two who testified on behalf of the plaintiff, for the reason that the witness from Detroit had much more information and was far more familiar with the true state of facts. And upon a careful consideration of the evidence in the record, we are in entire accord with the finding of the trial court. Furthermore, we are of the opinion that the plaintiff ought not to recover in this case because the facts, as stipulated, show that upon the arrival of the two cars in Detroit they were placed on the Dock team track and plaintiff immediately notified, and there is no evidence in the record - although there was some talk by counsel - as to why the cucumbers were not accepted on that track. Two days later the Railroad company moved the cars to the 12th street track, which was but two blocks distant, and the evidence shows without dispute that one track was as accessible as the other and that about half of the cars of produce coming into Detroit over the defendant

The undisputed evidence also is that it was but about two blocks from the place where the cars were placed on the Dock team track to the place where they were two days later delivered on the 18th street track. Two witnesses who lived in Chicago gave testimony to the effect that the usual place of delivering produce such as the cucumbers in question, in Detroit, by the defendant railroad was at the 18th street team track. But a careful reading of the testimony of these two witnesses discloses the fact that they had little information on the subject and their testimony is unsatisfactory. A witness for the defendant who lived in Detroit and who had been an adjuster and special investigator for the Claim department of the defendant railroad at Detroit for a number of years, testified that the usual place for delivery of such produce was at either of the two yards, and that about the same number of cars were delivered at each track.

The court in deciding the case gave more credence to the testimony of the latter witness than he did to the two who testified on behalf of the plaintiff, for the reason that his witness from Detroit had more extensive and was far more familiar with the true state of facts. And upon a careful consideration of the evidence in the record, we are in entire accord with the finding of the trial court. Furthermore, we are of the opinion that the plaintiff ought not to recover in this case because the facts, as stipulated, show that when the arrival of the two cars in Detroit they were placed on the Dock team track and plaintiff immediately notified, and there is no evidence in the record - although there was some talk by counsel - as to why the cucumbers were not accepted on that track. Two days later the Railroad company moved the cars to the 18th street track, which was but two blocks distant, and the evidence shows without dispute that one track was as accessible as the other and that about half of the cars of produce coming into Detroit over the defendant

railroad were placed upon either of the two tracks.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

relied were placed upon either of the two grounds.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

33661

CITY OF CHICAGO,
Appellee,
vs.
L. L. BOULE,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The City of Chicago, by leave of court, filed a quasi-criminal complaint against L. L. Boule, charging that Boule "did then and there conduct, operate and carry on ins. broker without having obtained a license so to do in violation of Sec. 384 of the Chicago Municipal Code of 1922." A jury was waived and the cause submitted to the court who, after hearing the evidence, found the defendant guilty as charged and a fine of $25.00 was imposed. The defendant, having failed to pay the fine, it was ordered that he be confined in the House of Correction.

Section 384 of the Municipal Code of Chicago 1922, of the violation of which the defendant was convicted, is as follows:

> "384. Insurance Broker.) An insurance broker shall include all natural persons whether so engaged in their individual capacity, or as a member of a firm, association or corporation, engaged for owners or others to be assured in negotiating contracts for insurance on lives, buildings, vessels or other property, including workmen's compensation, personal accident and disability, plate glass, automobile and all forms of casualty insurance and fidelity and surety bonds, either directly or through any other broker, or through an insurance agent, or with any insurance company."

The implication in the briefs and arguments filed in this court is that the court found the defendant guilty of acting as an insurance broker without having paid the license fee to the City of Chicago and obtaining a license card. A great deal of argument is indulged in by counsel for both sides as to whether defendant was acting as an insurance broker within the meaning of the City ordinance; but it is obvious that all of this argument is inapt because before the conviction of the defendant could be sustained a charge must be made against him, and there is no charge

[illegible]

CITY OF [illegible],
Appellee,

vs.

L. L. [illegible],
Appellant.

[illegible] Appeal from [illegible]
[illegible] Judgment.

[illegible] 1, 1933

Mr. Justice [illegible] delivered the opinion of the Court.

[illegible] criminal complaint against L. L. [illegible] and there convicted, [illegible] operating a [illegible] Municipal Code of [illegible] by the [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

made against him in the complaint filed. The complaint charges the defendant with the violation of section 384 of the Municipal Code above quoted, but that section attempts only to define an insurance broker. Obviously the work he did in connection with the insurance business did not violate section 384 because there is nothing in that section which one can violate.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

made against him in the complaint filed. The complaint assumes the defendant with the violation of section 704 of the penal code, as above quoted, but that section alleges that it relies on insolvency broker. Obviously the work in question contention with the insurance business if not violate section 704 however since it contains it that section which one can violate.

The judgment of the municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

McGuire, P. J., and Barnes, J., concur.

33676

AMBER FURNITURE COMPANY,
a Corporation,
Appellee,

vs.

HERMAN LAMM, EMIL LAMM and
BEN LAMM,
Appellants.

255 I.A. 533

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a decree entered by the Superior court of Cook county, reforming a lease and enjoining the defendants from attempting to collect a judgment entered in their favor against the complainant in the Municipal court of Chicago and further enjoining defendants from seeking to enforce any claim against the complainant for the use and occupation of a barn or garage located in the rear of 1646 West Chicago avenue.

The record discloses that on April 20, 1912, the owner of the premises known as 1646 to 1652 West Chicago avenue, inclusive, entered into a written lease with the complainant. The lease covered a period of ten years with an option to extend it to five years. The premises at 1646 were improved by a three-story building with a garage or barn in the rear; immediately adjoining this building on the west the property was vacant. The lease provided that the owner would construct a building on the vacant property. This building, together with the barn in the rear of 1646 West Chicago avenue, were covered by the lease. The building was constructed and complainant went into possession about August 1, 1912, and paid rent to the landlord during the entire period covered by the lease.

In 1923 the defendants purchased the property known as 1646 West Chicago avenue, and it was stipulated on the hearing that a witness for the complainant would testify that no demand was made

33676

AMERICAN TOBACCO COMPANY,
a Corporation,
Appellee,

vs.

BERNARD LAMM, EMIL LAMM and
ANS LAMM,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this record the defendants seek to reverse a decree entered by the superior court of Cook county, reforming a lease and enjoining the defendants from attempting to collect a judgment entered in their favor against the complainant in the municipal court of Chicago and further enjoining defendants from seeking to enforce any claim against the complainant for the use and occupation of a barn or storage located in the rear of 1846 West Chicago avenue.

The records disclose that on April 30, 1917, the owner of the premises known as 1844 to 1848 West Chicago avenue, including a barn, entered into a written lease with the complainant. The lease covered a period of ten years with an option to extend it to five years. The premises at 1844 were improved by a three-story building with a storage or barn in the rear; immediately adjoining this building on the west the property was vacant. The lease provided that the owner would construct a building on the vacant property.

This building, together with the barn in the rear of 1846 West Chicago avenue, were occupied by the lessee. The building was constructed and complainant went into possession about August 1, 1919, and paid rent to the landlord during the entire period covered by the lease.

In 1922 the defendants purchased the property known as 1846 West Chicago avenue, and it was stipulated on the hearing that a witness for the complainant would testify that no demand was made

by the defendants on the complainant for any rent or for any compensation for the use or occupation of the barn in the rear of 1646, and there is no evidence to the contrary. Counsel for the defendants stated on the trial that defendants had repeatedly claimed compensation of complainant for the use and occupation of the garage, but no evidence was offered on this pointby the defendants.

The written lease above mentioned described the premises as 1648, 1650 and 1652 West Chicago avenue, and the evidence shows that the property in the rear of which the barn or garage was located was known as 1646 West Chicago avenue. The bill alleged, and the evidence proves, that there was a mutual mistake in drafting the lease, that it should have described the barn or garage as being in the rear of 1646 West Chicago avenue, and there is no evidence to the contrary, nor is there any argument that this is not the fact. The evidence further shows without dispute that the complainant paid to the landlord the rent for the premises covered by the lease; and obviously if the defendants were entitled to claim compensation for the use and occupation of the garage or barn, complainant would be compelled to pay twice for this property.

The entire argument of the defendants in this court is not more than one-half page. The point argued is that "Courts will take judicial notice of matters of common knowledge," and the argument seems to be that complainant should have known that the garage was located in the rear of 1646 West Chicago avenue. The undisputed evidence, however, is that the landlord and the complainant-tenant made a mistake in the written lease and there is no evidence to the contrary nor is there any argument that the evidence does not sustain the decree. There is no merit in this appeal. A clear mutual mistake having been proven in the written lease, equity will decree its reformation as was done in the instant case, and the barn or

by the defendants on the complainant for any rent or for any compensation for the use or occupation of the barn in the year of 1866, and there is no evidence to the contrary. Counsel for the defendants stated on the trial that defendants had repeatedly claimed compensation of complainant for the use and occupation of the garage, but no evidence was offered on this subject the defendants.

The written lease above mentioned described the premises as 1640, 1642 and 1644 East Chicago avenue, and the evidence shows that the property in the rear of which the barn or garage was located was known as 1646 East Chicago avenue. The bill alleges, and the evidence proves, that there was a mutual mistake in drafting the lease, that it should have described the barn or garage as being in the rear of 1646 East Chicago avenue, and there is no evidence to the contrary, nor is there any evidence that this is not the fact. The evidence further shows clearly and conclusively that the complainant paid to the landlord the rent for the premises covered by the lease; and obviously if the defendants were entitled to claim compensation for the use and occupation of the premises or barn, complainant would be constantly liable for [illegible] rent.

The entire argument of the defendants in this court is not more than one-half page. The point argued is that "courts will take judicial notice of matters of common knowledge," and the cases were cited to be that complainant should have known that the garage was located in the rear of 1646 East Chicago avenue. The undisputed evidence, however, is that the landlord [illegible] made a mistake in the written lease and there is no evidence in the contrary nor is there any argument that the [illegible] obtain the barn. There is no merit in this argument. A clear mutual mistake having been proven in the written lease, equity will reform the reformation as was done in the present case, and the part of

garage having been leased to the complainant, who paid the rent therefor in full, the defendants are in no position to interpose any defense. When they purchased the property in 1923 the garage or barn was in open possession of the complainant and so far as the record before us shows, no demand was made on the complainant to pay compensation until suit was brought in the Municipal court in February, 1927.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

garage having been leased to the complainant, who paid the rent therefor in full, the defendants are in no position to interpose any defense. When they purchased the property in 1933 the garage or barn was in open possession of the complainant and so far as the record before us shows, no demand was made on the complainant to pay compensation until suit was brought in the municipal court in January, 1937.

The decree of the superior court of Cook County is affirmed.

AFFIRMED.

McGuire, P. J., and Matchett, J., concur.

33692

CARROLL, SCHENDORF & BOENICKE, INC., a Corporation,
Defendant in Error,

vs.

I. GITTLER,
Plaintiff in Error.

255 Ill. 633

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover $205.11 claimed to be due it as real estate broker's commissions for the unexpired terms of leases obtained by it for the defendant. There was a trial without a jury and a finding and judgment in plaintiff's favor for $200.

The record discloses that on April 20, 1928, plaintiff and defendant entered into a written agreement from which it appears that the defendant was the owner of the apartment building known as number 4650 to 4656 Woodlawn avenue, Chicago, consisting of sixteen flats or apartments; that plaintiff was appointed defendant's exclusive agent for the care, management, leasing and collecting rents from the premises from "April 20, 1928, until I sell the building." Plaintiff was to receive in payment of its services, three per cent on all rents collected and was to make monthly reports to defendant. The contract also contained the following paragraph: "In case of withdrawal of management, I will pay Carroll, Schendorf & Boenicke, Inc., the regular Chicago Real Estate Board commission on the unexpired term of new or renewed leases which have been drawn by Carroll, Schendorf & Boenicke, Inc."

It was stipulated that on November 1, 1928, the defendant sold the property and that the tenants of the building had entered into leases, through plaintiff's efforts, which had not at that time expired. Plaintiff claimed commissions of three per cent of the amount of the rent reserved by the leases, which was

[illegible] MORTGAGE & [illegible],
INC., a Corporation,
Defendant-in-Error,

vs.

I. [illegible],
Plaintiff-in-Error.

[illegible]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT:

Plaintiff [illegible] seeks reversal of the defendant's judgment [illegible] 2-103.1a [illegible] to be [illegible] it is real estate brokerage commissions for the negotiation leasing of lands [illegible] by it for the defendant. There was a trial [illegible] and a finding and judgment in plaintiff's favor for $[illegible].

The record discloses that on April [illegible], [illegible], plaintiff and defendant entered into a written agreement [illegible]. It appears that the defendant was the owner of the [illegible] building known as number 4[illegible] in 1550 [illegible] avenue, Chicago, consisting of various flats or apartments; and plaintiff was specialized [illegible] in the leasing of the same, management, leasing and collection rents from the premises. [illegible] April 3, 1[illegible], until a [illegible] building." Plaintiff was to receive [illegible] commissions, [illegible] on all rents collected [illegible] company [illegible] parts to defendant. The contract also contained the following paragraph: "In case of alienation of [illegible], will pay Carroll, Bennett & [illegible], Inc., [illegible] commission [illegible] Board commission on the unexpired term of lease or leases [illegible] which have been drawn by [illegible]."

It was at [illegible] that the defendant sold the property and the lease [illegible] entered into [illegible] plaintiff's activity, which had not at that time expired. Plaintiff claimed commissions on [illegible] rent of the amount of the rent reserved by the lease. Plaintiff was

the regular Chicago Real Estate Board rate of commission. It was further stipulated that plaintiff's statement of claim "correctly states the amount of the Chicago Real Estate Board's Commission on said unexpired leases, to-wit: two hundred and five dollars, and eleven cents ($205.11), and prior to the sale of the building by the defendant, and that the defendant withdrew the management of said building from the plaintiff."

The defendant's contention is that plaintiff was entitled to no commission after the sale of the building, which was November 1st, and that since all of plaintiff's claim is for the commissions due on the unexpired term of the leases after November 1st, plaintiff was entitled to no judgment; that the written agreement entered into between plaintiff and defendant April 20th, above mentioned, meant that the plaintiff would be entitled to commissions for the unexpired terms of the leases only in case the defendant voluntarily withdrew the building from the plaintiff, and that since the withdrawal was not voluntary but by virtue of the sale, the judgment is wrong. Whatever might be the proper construction to be placed upon the provision of the last paragraph of the contract above quoted, in case the withdrawal was brought about solely on account of the sale of the property by defendant, we do not pass upon because the stipulation entered into by the parties on the trial is that the building was withdrawn by the defendant prior to the sale. This being the fact, defendant's contention is untenable and the judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

the regular Chicago real estate board rate of commission. It was further stipulated that plaintiff's assessment or claim "correctly states the amount of the Chicago real estate board's commission on said unexpired lease, to-wit: two hundred and five dollars, and eleven cents ($205.11), and prior to the sale of the building by the defendant, and that the defendant undertook the management of said building from the plaintiff."

The defendant's contention is that plaintiff was entitled to no commission after the sale of the building, which was November 1st, and that since all of plaintiff's claim is for the commissions due on the unexpired term of the lease after November 1st, plaintiff was entitled to no judgment; that the written agreement entered into between plaintiff and defendant April 6th, above mentioned, meant that the plaintiff would be entitled to commissions for the unexpired terms of the lease only in case the defendant voluntarily withdrew the building from the plaintiff, and that since the withdrawal was not voluntary but by virtue of the sale, the judgment is erroneous. Whatever might be the proper construction to be placed upon the provision of the last paragraph of the contract above quoted, in case the withdrawal was brought about solely on account of the sale of the property by defendant, we do not base upon because the stipulation contains into by the parties on the trial is that the building was withdrawn by the defendant prior to the sale. While being the fact, defendant's contention is untenable and the judgment of the municipal court should be affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

33732

THE MERCHANTS AND MANUFACTURERS SECURITIES COMPANY, a Corporation, Appellant,

vs.

GEORGE W. FORD, MARIE S. FORD, ROSWELL N. JONES, DAISY I. JONES, et al., said Roswell N. Jones and Daisy I. Jones being Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the complainant seeks to reverse a decree of the Superior court of Cook county sustaining a general and special demurrer of certain defendants and dismissing the bill for want of equity. The question for decision is, does the amended bill state a cause of action.

The bill was one which sought to foreclose a mechanic's lien on certain property on account of the non-payment for a garage constructed by the complainant. It alleged that complainant was the owner of a written contract entered into between the contractor who constructed the garage and two of the defendants who were alleged to be tenants of two other defendants who were the owners of the property, and that the owners of the premises knowingly permitted the work to be done. Other lien holders were made parties defendant. The bill alleged that a contract for the construction of the garage was entered into July 14, 1927; that the contractor constructed the garage, which was accepted; that certain payments were made, leaving a balance due of $201.80; that on August 2, 1927, the contract was assigned by the contractor to the complainant; that the last work was done on August 2, 1927; that claim for lien was filed in the clerk's office of the Circuit court of Cook county on August 11, 1927; that the claim for lien gave the date of the contract, when the work was completed, the amount due, and a sufficiently correct description of the real estate.

33732

THE ATLANTIC & PACIFIC GUARANTEE
SECURITIES COMPANY, a Corporation,
Appellant,

vs.

GEORGE W. JONES, HARRIS S. JONES,
KENNETH A. JONES, DAISY I. JONES,
et al., said Kenneth A. Jones and
Daisy I. Jones being
Appellees.

Appeal from Superior Court
of King County.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the complaining party seeks to overturn a decree of the superior court of King county quieting a general and special demurrer of certain defendants and dismissing the bill for want of equity. The question for decision is, Is the amended bill state a cause of action.

The bill was one which sought to foreclose a mechanic's lien on certain property on account of the furnishing for a garage constructed by the defendant. It alleged that complainant was the owner of a written contract entered into between the contractor who constructed the garage and the defendants who were supposed to be interested in the other building with here the owners of the property, and that the owners of the premises knowingly permitted the work to be done. Under this claims were made against defendant. The bill alleges that a contract for the construction of the garage was made late July 14, 1926; that the contractor constructed the garage, which was completed; that certain payments were made, leaving a balance due of $201.00; that on August 5, 1926, the contract was abandoned by the contractor or the contractor; that the last work was done on August 2, 1927; that claim for lien was filed in the clerk's office of the superior court of King county on August 11, 1927; that the clerk [illegible] contract; when the work was completed, [illegible] identify correct description of the real property.

The defendant contends, as we understand his argument, that certain exhibits were attached to the original bill and also to the supplemental bill, and that there is a variance between some of these exhibits and the allegations of the bill; that the bill alleges that the contract was entered into by John Telger, doing business as the Acme Construction Company, while the contract attached as an exhibit to the amended bill shows the contractor to be the Acme Construction Company; certain other variances are pointed out between the exhibits and the allegations of the bill.

On the other hand, complainant contends that there is no such variance and points to a copy of the contract which was attached as Exhibit A of the original bill, in which the contractor is named as John Telger, doing business as the Acme Construction Company. We think that none of these contentions are before us because an examination of the amended bill discloses the fact that no such exhibits were alleged to be attached to the amended bill except "Exhibit A" which is a copy of the account sued upon, showing the total amount of the contract to be $231.80 and a payment of $30, leaving a balance due of $201.80.

We think the notice of the claim for lien filed with the clerk of the Circuit court was in compliance with section 7 of the Mechanics' Lien Act. We are also of the opinion that the petition substantially stated all that the statute required. In this view we think the court erred in sustaining the demurrer to the amended bill.

It follows, therefore, that the decree of the Superior court of Cook county is reversed and the cause remanded for such further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

The defendant contends, as we understand his argument, that certain exhibits were attached to the original bill and also to the supplemental bill, and that there is a variance between some of these exhibits and the allegations of the bill; that the bill alleges that the contract was entered into by John Talger, doing business as the Acme Construction Company, while the contract attached as an exhibit to the amended bill shows the contractor to be the Acme Construction Company; certain other variances are pointed out between the exhibits and the allegation of the bill.

On the other hand, complainant contends that there is no such variance and points to a copy of the contract which was attached as Exhibit A of the original bill, in which the contractor is named as John Talger, doing business as the Acme Construction Company. We think that none of these contentions are before us because an examination of the amended bill discloses the fact that no such exhibits were alleged to be attached to the amended bill except "Exhibit A" which is a copy of the account sued upon, showing the total amount of the contract to be $521.00 and a payment of $50, leaving a balance due of $501.00.

We think the notice of the claim for lien filed with the clerk of the Circuit court was in compliance with section 7 of the Mechanics' Lien Act. We are also of the opinion that the petition substantially stated all that the statute required. In this view we think the court erred in sustaining the demurrer to the amended bill.

It follows, therefore, that the decree of the Superior court of Cook county is reversed and the cause remanded for such further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

McCurdy, P. J., and Matchett, J., concur.

33565

255 I.A. 634

CHICAGO VITREOUS ENAMEL PRODUCT CO., a Corporation,
Appellee,

vs.

GERMER STOVE CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for merchandise sold and delivered to defendant. Defendant did not deny the deliveries nor liability but filed a plea of set-off, claiming that the merchandise in controversy was of a poor quality which when used resulted in loss of profits and in damages. The case was tried before the court and jury, but at the conclusion of the evidence the court directed a verdict for plaintiff. Judgment was entered thereon for $10,678.65, from which defendant appeals.

This controversy arises over the commodity called frit, which is a glass product used as the basis of enamelware. Frit is made by running melted glass into water and then breaking it up into small pieces about the size of a pea. It is then put through various processes of grinding and mixing with water and other ingredients to the consistency of a thin paint which is sprayed by air pressure upon the material to be enameled, which is then baked. The frit was shipped while in the pea state, when it is impossible by inspecting it to determine whether or not it is defective or of a poor quality. This can be determined only by the results of the enameling.

Shipments of the frit in question commenced in January 1927, and continued at various times until the following September inclusive. Shortly after the shipments in January defendant made complaint about the results of enameling and many conferences and

CHICAGO VITREOUS ENAMEL PRODUCT CO., a Corporation,
Appellee,

vs.

GERARD STOVE CO., a Corporation,
Appellant.

A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for merchandise sold and delivered to defendant. Defendant did not deny the delivery nor its utility but filed a plea in recoupment, claiming that the merchandise is worthless because of a poor quality glass used resulting in loss of profits and in damage. The case was tried before the court and jury, but at the conclusion of the evidence the court directed a verdict for plaintiff. Judgment was entered thereon for $10,[illegible], from which defendant appeals.

This controversy arises over the commonly called frit, which is a glass product used in the manufacture of enamelware. Frit is made by fusing certain raw materials in a furnace and then breaking it up into small pieces which are then ground. It is then put through various processes of grinding and mixing, with water and other ingredients to the consistency of a thin paste. This is sprayed by air pressure upon the [illegible] to enamelware, which is then baked. The frit was made by Pfaudler in [illegible], and it is incorporated by [illegible] in the [illegible] of the [illegible] defective or of a poor quality. [illegible] the [illegible] of the enamelware.

Defendant [illegible] 1927, [illegible] at various times [illegible] the entire [illegible] Inclusive. Shortly after the [illegible] a [illegible] complaints about the frit's [illegible] and [illegible] and

communications were had in an attempt to locate the cause of the trouble, which seemed to be somewhat obscure. Defendant kept all of the shipments.

Defendant argues that (1) the frit was sold under an implied warranty that the goods were reasonably fit for the purposes of producing enamel, that the seller knew it was ordered for this particular purpose, and that the buyer relied upon the seller's skill or judgment. Section 15, paragraphs 1 and 2 of the Sales act; (2) that the question as to whether the unsatisfactory enameling was caused by an inferior quality of frit, as claimed by defendant, or caused by improper factory conditions, as testified to by plaintiff's witnesses, was for the jury to determine; (3) that defendant could keep the goods and claim a set-off against the seller for damages for breach of warranty. Section 69, Sales Act.

Even if it be assumed that all of these points are sound, it would not avail the defendant upon this record, for the reason that there is no evidence upon which the jury could fix the amount of damages suffered by defendant. It is said that the court improperly excluded the deposition of Mr. Knobloch whose testimony would have proven the amount of damages. Even if this had been admitted it would have failed to give any definite basis for fixing damages. Knobloch testified that his company, the Erie Metal Furniture Company, had an agreement with the defendant company in June, 1927, to deliver a certain number of enameled door backs and that there were some defects in the enamel of some of them and these were rejected. When asked as to the percentage of rejections, he replied, "I would not be able to state that definitely;" that to the best of his recollection they would be as high as 75 per cent "on some days." Such testimony would only call upon the jury to guess as to the amount of damages. All of the testimony relevant to damages was nebulous and uncertain.

communications were had in an attempt to locate the cause of the trouble, which seemed to be somewhat obscure. Defendant kept all of the shipments.

Defendant argues that (1) the cloth was sold under an implied warranty that the goods were reasonably fit for the purposes of producing dresses, that the seller knew it was ordered for this particular purpose, and that the buyer relied upon the seller's skill or judgment. Section 15, paragraphs 1 and 2 of the Sales act; (2) that the question as to whether the unsatisfactory enameling was caused by an inherent quality of fabric, as claimed by defendant, or caused by improper factory conditions, as testified to by plaintiff's witnesses, was one for the jury to determine; (3) that defendant could keep the goods and claim a set-off against the seller for damages for breach of warranty. Section 69, Sales Act.

Even if it be conceded that all of these points are sound, it would not avail the defendant in this record, for the reason that there is no evidence upon which the jury could fix the amount of damages which defendant sustained. It is said that the court improperly excluded [illegible] of Mr. [illegible] whose testimony would have proved the amount of damages. Even if this had been admitted it would not have fixed [illegible] rates for [illegible] [illegible], the Treasurer [illegible] company, [illegible] Germany in June, 1927, [illegible] that goods and that [illegible] of them and others were rejected. [illegible] rejections, [illegible] "I would [illegible] already;" [illegible] high as 75 per cent [illegible] call upon the [illegible] in the amount [illegible]. [illegible] of the testimony [illegible]

To maintain a claim of set-off defendant must prove the items of damages with the same particularity and definiteness as if he were the plaintiff in a case seeking to recover damages, and where there is no evidence on which to predicate a verdict for a certain amount, it is proper for the court peremptorily to instruct the jury.

We do not wish to be understood as passing upon the various questions raised in the respective briefs of counsel, but for the sole reason indicated above we hold that the trial court was justified in instructing for the plaintiff.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

To maintain a claim of set-off defendant must prove the liquid damages with the same particularity and definiteness as if he were the plaintiff in a case seeking to recover damages, and where there is no evidence on which to predicate a verdict for a certain amount, it is proper for the court peremptorily to instruct the jury.

We do not wish to be understood as passing upon the various questions raised in the respective briefs of counsel, but for the sole reason indicated above we hold that the trial court was justified in instructing for the plaintiff.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

33739

PIONEER REALTY CO.,
Defendant in Error,

vs.

GEORGE STASZAK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks the reversal of a judgment against him of $1470 entered upon the verdict of the jury. Confession of judgment was originally entered on a note executed by defendant to the order of plaintiff. Leave was given to defend and upon trial the judgment was entered.

Plaintiff is a corporation engaged in the real estate business and the note represents brokers' fees claimed to have been earned by it. B. F. Dombrow, Peter Oleck and Stanley Basinski, witnesses for plaintiff, are members of the plaintiff company, Basinski being its attorney. Defendant owned property on Marshfield avenue, where he lived. He has no schooling and cannot read and has difficulty in understanding the english language. Defendant testified that Oleck called on him at his home and inquired if defendant's property was for sale. Oleck then took him in an automobile to four or five places and to 4049 South Kedzie avenue. Defendant indicated that he might be willing to exchange his property for the South Kedzie property if terms of exchange were satisfactory to him.

The owners of the respective properties, with the brokers, met in the office of plaintiff and Basinski drew up a contract in which defendant is the seller and Peter Siwinski, Kate Siwinski and Stanley Lakomiak the purchasers. Basinski started to read it in English but defendant told him that he could not understand everything in the English language, so Basinski read it in Polish. It

is dated November 19, 1927, bears the signature of the parties and was recorded November 21. It provides that the defendant shall pay $1470 as "Brokerage Fees;" the other party also to pay fees. The note in question representing the fees to be paid by defendant was given at the same time.

There is a dispute as to the terms. Defendant says he was to get $7,000 in cash and claims to have been misled as to certain other matters which it is not necessary to notice as the case must be decided upon another point.

Plaintiff must recover, if at all, by virtue of the contract between the seller and purchasers. It is not a case where plaintiff has procured a purchaser ready, willing and able to buy upon the terms proposed by the seller. Cases cited by plaintiff on such facts are not in point. Here, plaintiff did not produce such a purchaser, but its claim is based upon the contract itself. Under such circumstances, unless it can be shown that the plaintiff has procured a valid and enforceable contract between the parties, it has performed no services entitling it to the fees mentioned in the contract. Faiman v. London, 246 Ill. App. 606; Wilson v. Mason, 158 Ill. 304; Young v. Trainor, 158 Ill. 428; Jenkins v. Hollingsworth, 83 Ill. App. 139; Carroll v. Leafgreen, 170 Ill. App. 328.

We hold that the contract is so vague and indefinite as to be unenforceable. The contract provides that defendant agreed to convey his property on Marshfield avenue at a price of $49,000 clear, and the other parties agreed to convey the South Kedzie avenue property at $37,000, subject to encumbrances of $17,000. The contract provides that the seller (the defendant) agrees "to procure a first mortgage of about $18,000 or more and for not less than 3 years or for 5 years if possible with interest at 6% per annum, payable semi-annually." A similar indefiniteness as to the mortgage was held to make the contract unenforceable in Sluka v. Bielicki,

is dated November 19, 1927, bears the signature of the parties was recorded November 21. It provides that the defendant shall pay $1,[illegible]0 as "Tonsterage Fees;" the other party also pay fees. The note in question representing the fees to be paid by defendant was given at the same time.

There is a "Clause 24" in the terms. Defendant says he was to get $7,[illegible]0 in cash and claims to have been misled or to certain other matters which it is not necessary to notice as the case must be decided upon another point.

Plaintiff must recover, it is said, by virtue of the contract between the parties and Tonsmeire. It is not a case where plaintiff has procured a pure agent ready, willing and able to buy upon the terms proposed by the principal. Cases cited by plaintiff on such facts are not in point. Here, plaintiff did not produce such a purchaser, but its claim is based upon the contract itself. Under such circumstances, unless it can be found that plaintiff has proved a valid and enforceable contract between the parties, it has performed no service entitling it to the fees mentioned in the contract. Valmore v. Lawson, [illegible] Ala. [illegible]; [illegible] v. Mason, 188 Ill. [illegible]; Young v. Stanton, 180 Ill. [illegible]; Cushing v. Pillsbury, [illegible] Ill. App. [illegible]; Carroll v. Lefferson, [illegible] Ill. App. [illegible].

[illegible] the contract is so vague and indefinite as to be unenforceable. The contract provides that defendant agreed to convey his property on a mutually satisfactory basis [illegible] close. If the other parties agreed to convey, the [illegible] property at $[illegible], subject to [illegible] at $[illegible]. [illegible] contract provides that the owner (the defendant) agrees "to execute a first mortgage of about $[illegible]. [illegible] years or for [illegible] payable semi-annually." A [illegible] was held to make the contract unenforceable in Alden v. Iseloff,

335 Ill. 202; London v. Doering, 325 Ill. 589.

The contract further provides: "The seller also agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser on his property." This is ambiguous. A slight consideration shows that it cannot mean literally what it says. The price at which the seller's property was fixed was $49,000 clear. The price of the purchasers' property was $37,000, subject to encumbrances of $17,000, leaving the equity of the purchasers property at $20,000. If the seller placed a mortgage of $18,000 on his property, his equity would be $31,000. The difference between the equity of the purchasers - $20,000 - and the amount of the first mortgage of $18,000, which the contract provides for, is $2,000; but the actual difference between the $20,000 equity of the purchasers and the $31,000 equity of the seller is $11,000. What then becomes of the $9,000, the difference between the $2,000 junior mortgage and the $11,000, the difference in value of the respective equities? The contract does not tell us.

We are also in doubt as to just what is meant by the agreement for the seller "to leave to the purchaser a junior mortgage." On what property is this junior mortgage to be placed? The fact that a fairly close guess might be made as to what was intended does not make the contract definite and enforceable.

Realizing the uncertainty and ambiguity of the contract, Dumbrow was permitted to testify, giving his construction of it. His answers were merely conclusions and his testimony in this regard was incompetent. Leftus v. Chicago Rys. Co., 293 Ill.475; People v. Cowgill, 334 Ill. 635. The construction of the contract was for the court. Carstens Pack. Co. v. Sterns & Son Co., 286 Ill. 355.

We hold that the contract was so ambiguous and

338 Ill. [illegible]; Landen v. [illegible], [illegible] Ill. [illegible].

The contract further provides: "The seller agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser in the property." This is ambiguous. A slight consideration shows that it cannot mean literally what it says. The price at which the seller's property was fixed was $40,[illegible] [illegible]. The price of the purchasers' property was $27,[illegible], subject to a mortgage of $17,[illegible], leaving the equity of the purchasers [illegible] at $[illegible]. If the seller placed a mortgage of $16,[illegible] on his property, his equity would be $24,[illegible]. The difference between the equity of the purchasers [illegible] and the amount of the first mortgage of $16,[illegible], which the contract provides for, is $[illegible], and the actual difference between the $[illegible] equity of the purchasers and the [illegible], the equity of the seller is $[illegible]. What then becomes of the [illegible], the difference between the $[illegible] junior mortgage and the $[illegible], the difference in value of the respective equities? The contract does not tell us.

We are also in the dark as to what is meant by the agreement for the seller to leave to the purchaser a junior mortgage." On what property is this junior mortgage to be placed? The fact that a [illegible] [illegible] [illegible] [illegible] intended to [illegible] the contract [illegible] [illegible] intentions.

[illegible] the [illegible] [illegible] [illegible] of the contract, [illegible] [illegible] [illegible] his construction of it. His answers were [illegible] and his testimony in this regard was incompetent. [illegible] v. [illegible], [illegible] Ill. [illegible]; Temple v. [illegible], [illegible] Ill. [illegible]. The construction of the contract was for the court. [illegible] v. [illegible], [illegible] Ill. 255.

We hold that the contract was [illegible] [illegible]

indefinite as to be unenforceable and therefore the sole consideration for the note sued upon failed.

At the conclusion of the evidence the defendant moved the court to instruct the jury to find for him. This motion was overruled and the instruction refused. As we have indicated, the court should have found that the contract was unenforceable and that the consideration for the note had therefore failed. It was error to deny defendant's motion.

For the reason indicated the judgment is reversed, and as in law plaintiff cannot recover in this action the cause is not remanded and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Matchett and O'Connor, JJ., concur.

indefinite as to be unenforceable and therefore in this connection for the note sued upon herein.

At the conclusion of the evidence the defendant moved the court to instruct the jury in favor of him. This motion was overruled and the instruction refused. We have carefully, the court should have found that the contract was unconscionable and that the consideration [illegible] was error to deny defendant's motion.

For the reason indicated the judgment is reversed, and as to the plaintiff cause. However in this action the cause is not remanded and jurisdiction of all parties is retained in this court.

REVERSED AND REMANDED ON ALL SUCH.

Matchett and Lemmon, J.J., concur.

33805

ZEKKAT BAGDADI, Administratrix of the Estate of Hobeur Hussein, Deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET AND SOUTH CHICAGO RAILWAY COMPANY and SOUTHERN STREET RAILWAY COMPANY, Corporations Doing Business as CHICAGO SURFACE LINES,
Defendants in Error.

255 I.A. 234

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Hobeur Hussein (hereafter called plaintiff), a young woman nineteen years of age, fell or was thrown from a step of a street car owned and operated by defendants, receiving injuries from which she died. The administratrix of her estate brought suit for damages. At the close of all the evidence the court instructed the jury to find for the defendants, which was accordingly done. We are asked to reverse the adverse judgment.

The question for determination is the propriety of the peremptory instruction to find for the defendants. In the well known case of Libby, McNeill & Libby v. Cook, 222 Ill. 206, the rule is stated that, if there is any evidence in the record from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments of the declaration have been proven, the case should be submitted to the jury. "When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict if returned must be set aside because against the manifest weight

MERRAT KADGANI, Administratrix of the Estate of Robert Bussein, Deceased,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, SALUMET AND SOUTH CHICAGO RAILWAY COMPANY and SOUTHSIDE ELEVATED RAILWAY COMPANY,
Corporations doing business as CHICAGO RAPID TRANSIT LINES,
Defendants in Error.

MR. PRESIDING JUSTICE MORETON
DELIVERED THE OPINION OF THE COURT.

Robert Bussein (hereinafter called plaintiff), a young woman nineteen years of age, left or was thrown from a car of a street car owned and operated by defendants, receiving injuries from which she died. The administratrix of her estate brought suit for damages. At the close of all the evidence the court instructed the jury to find for the defendants, which was accordingly done. We are asked to reverse the judgment.

The question for determination is the propriety of the peremptory instruction in the case at bar. In the well known case of Pillsbury, Kennedy & Barry v. Pope, 201 Ill. 269, the court stated that, if there is any evidence in the record tending to support the plaintiff's cause of action, it is error to instruct the jury to find for the defendant. In the opinion in that case, the court said: "Upon a motion for a peremptory instruction it is the duty of the court to decide, if there is any evidence in the record tending to support the plaintiff's cause of action, whether it is sufficient to warrant a verdict in favor of the plaintiff. It does not decide the weight of any evidence, nor resolve in question it, a verdict about to be directed. If the court is of the opinion that there is evidence in the record which, taken alone, is sufficient to warrant a verdict, it must hold that a verdict if returned must be set aside because without the evidence."

of all the evidence, then the motion should be denied. (Cited cases). To hold otherwise is to deny to plaintiff the right of trial by jury. There may be in a record evidence which, standing alone, tends to prove all the material averments of the declaration, and which is therefore sufficient to support, warrant or sustain a verdict in favor of plaintiff, and yet, upon the whole record the evidence may so preponderate against the plaintiff that a verdict in his favor cannot stand when tested by a motion for a new trial."

The declaration alleged that Hobeur Hussein was a passenger on defendants' street car, that she went to the rear platform and in the exercise of due care and caution for her own safety was alighting from the car at Flourney street, which had stopped there for this purpose, but defendants' servants negligently failed to give her a reasonable opportunity to alight but started the car forward with a jerk before she had fully alighted therefrom, so that she was thrown forward from the platform to the street, thereby sustaining injuries which resulted in her death.

The accident happened about eleven o'clock in the evening of August 31, 1922, at the intersection of Kedzie avenue, which runs north and south, and Flourney street, which runs east and west, in Chicago. Plaintiff and her sister, Mrs. Bagdadi, the administratrix here, were passenger on a southbound Kedzie avenue car. Their destination was their home in the block on the west side of Kedzie and a little south of Flourney. The car stopped on the north side of Flourney street, and the decisive question is whether at this time plaintiff, while in the act of alighting, was thrown to the street by the sudden starting of the car or whether she fell or jumped off while the car was crossing the south crosswalk of Flourney street.

Defendants strongly urge that the testimony of the two witnesses for the plaintiff is so vague and uncertain and contradictory as to have no probative effect whatever and hence the

of all the evidence, then the motion should be sustained. Lastly
cases). To hold otherwise is to deny to plaintiff the right of
trial by jury. There may be in a recent evidence which, standing
alone, tends to prove all the material issues of the indictment,
and which is therefore sufficient to support a verdict, nevertheless
a verdict in favor of plaintiff, nor yet, when the whole record
the evidence may be reasonably against the defendant's favor a verdict
in his favor cannot stand. [illegible] for a new trial."

The defendants alleged that Grover Darwin was a
passenger on defendants' street car, that he went to the rear plat-
form and in the exercise of the care and caution for his own safety
was alighting from the car in ordinary manner, while the conductor
there for his business, and defendants' servants negligently failed
to give him a reasonable opportunity to alight and started the car
forward with a jerk [illegible] and thereby dislodged therefrom, so that
he was thrown forward [illegible] the street, thereby
sustaining injuries [illegible] in her behalf.

[illegible] about 11 [illegible] in the evening
of August 7, [illegible] of which [illegible], while
[illegible] Thursday [illegible], which runs east and west,
in Chicago. [illegible] of her sister, Mrs. Dagmar, the complainant
herein here, were passengers on a southbound cottage grove car. Their
destination was their home in the front on the east side of Michigan
and a little south of Thirty-[illegible]. The car stopped on the north side
of Thirty-[illegible] street, on the crossing [illegible] the
time [illegible], while in [illegible] the [illegible] in the
street by the guides [illegible] or
jumped off while the car was [illegible] of
Thirty-[illegible] street.

Defendants strongly urge [illegible] the testimony of the
two witnesses for the plaintiff in so vague and uncertain and
contradictory as to have no probative effect whatever [illegible]

peremptory instruction for the defendants was proper.

The first witness for plaintiff was Louis Majcen, who testified that he was on the rear platform of the car; that when it stopped at Flournoy street "one lady" (the plaintiff) "wanted to go down off the car, she was on the full step already - the lady was on the step *** and she was holding with one hand the iron bar and at the same time that conductor ring the bell and the car start to go on full speed and she fell down with her face forwards." And again: "she just went to step down on the ground from the right step and that second the conductor ring the bell and the car put it right on the speed."

Mrs. Bagdadi testified that she rang the bell for the conductor to stop at Flournoy street and they got up for the purpose of alighting there; that her sister went first; that her sister "take her foot from the platform, she was holding that iron board - that grab handle, and then she goes to put the other foot down on the stairs and the car jerked and she fall." She says that the car was standing still when her sister started to alight.

Both of these witnesses were of foreign birth and evidently had considerable difficulty in the use of the English language. They gave other testimony to the effect that the plaintiff fell at the south crosswalk of Flournoy, which, it is argued, squarely contradicts their testimony that she fell as the car was starting from north of Flournoy. The fact that these witnesses, because of their unskilfulness in understanding or speaking English, seemingly gave confused or contradictory statements, goes to the weight of their evidence. Both of them testified substantially that the accident happened as alleged in plaintiff's declaration. There was some evidence tending to prove the averments of the declaration and the cause should have been submitted to the jury.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

parenthetically instructing the defendants was proper.

The first witness for plaintiff was Louis Eagleson, who testified that he was on the rear platform of the car; that when it stopped at Kearney avenue "one lady" (the plaintiff) "walked to go down off the car, she was on the full step already - the lady was on the step --- and she was holding with one hand the iron bar and at the same time that conductor rang the bell and the car started to go at full speed and she fell down with her face forward." And again: "she just went to step down on the ground from the right step and then ground the conductor rang the bell and the car put it right on the speed."

Mrs. Hagdahl testified that she took the bell for the conductor to stop at Kearney avenue and they got up for the purpose of alighting there; that her sister went first; that her sister "take her foot from the platform, she was holding back from behind - that grab handle, and then she was to put the other foot down on the stairs and the car started and she fell." She says that the car was starting with more or slower speed to all 'em.

Both of these witnesses were of foreign birth and particularly had considerable difficulty in the use of the English language. They gave other testimony in the effort that the plaintiff fell at the south crossroad of Kearney, which, it is argued, accurately contradicts their testimony that she fell on the car was starting from north of Kearney. The fact that some discrepancies, inaccuracies of inaccuracies in redaction, or expressing opinions, sometimes even contained or contradictory statements, not in the weight of their evidence. Both of these witnesses unfortunately the non-material happened to alleged in plaintiff's "[illegible]". [illegible] evidence tending to prove the exact case of the defendants and the cause should have been submitted to the jury.

For the reasons indicated [illegible] judgment is reversed and cause remanded.

HEPBURN, JUDGE PRESIDENT.

33866

PHIL W. FOSTER,
Appellant,

vs.

WARD PERRY, A. H. TOWNSEND
and PALM BEACH REAL ESTATE CO.,
a Corporation,
Appellees.

255 I.A. 335

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an action in trespass on the case on promises tried by the court without a jury, which found against the plaintiff. From the judgment of nil capiat he appeals.

Apparently no issue was made as to the Palm Beach Real Estate Company. Plaintiff attempts to fix liability for $40,000 on the other defendants, Ward Perry and A. H. Townsend, by virtue of certain mortgage notes executed and delivered to the plaintiff by the Palm Beach Real Estate Company as part payment for Florida land sold to it by plaintiff. The first count of plaintiff's declaration declared on these notes and the second count was for the balance of the purchase price of the property claimed to be due from all the defendants.

Plaintiff first argues that the evidence shows that all of the defendants were joint adventurers or partners in the purchase of the land in question. Perry and Townsend (hereafter called defendants) deny this.

The Palm Beach Real Estate Company is a Florida corporation with an office in West Palm Beach, Florida. George C. Moore was its president and J. C. Christ its vice-president. March 7, 1925, this corporation by its vice-president, Christ, wrote a letter to the defendant Townsend in Chicago to the effect that if he, Townsend, wished to come in with the Palm Beach Real Estate Company on the purchase of some land, "You may do so if you act at once." A rough sketch plat was enclosed together with a statement as to the price the company was paying for the

[illegible]

NEIL W. TORREY,

Appellant,

vs.

WARD PERRY, A. M. TORREY AND
and PALM BEACH REAL ESTATE CO.,
a corporation,

Appellees.

[illegible]

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an action in trespass on the case in [illegible] tried by the court without a jury. [illegible] found against the plaintiff. From the judgment of nil capiat he appeals.

Apparently no issue was made as to the [illegible] Real Estate Company. Plaintiff's authority to file indemnity for $40,000 on the [illegible] Real Estate [illegible] . Thereupon, by virtue of certain [illegible] contracts executed [illegible] the plaintiff by the Palm Beach Real Estate Company [illegible] for Florida land [illegible] plaintiff. The first count of plaintiff's declaration [illegible] the second count was for the balance of [illegible] money claimed to be [illegible] fraudulent.

Plaintiff [illegible] all of the [illegible] joint adventurers or [illegible] purchase [illegible] called [illegible] deals.

[illegible] was [illegible] a Florida corporation with [illegible] Beach, Florida. [illegible] J. Moore was its president and [illegible] its vice-president. March 7, 1926, [illegible] in the [illegible], [illegible] wrote a letter to the [illegible] stating [illegible] effect that if he, Torrey, [illegible] Real Estate Company or the [illegible] if you [illegible] at [illegible]." A [illegible] with a [illegible]

property. The letter further stated that the company must retain full power to sell the property without consulting the defendants, and, "Now, if you want to go in this way, get busy. I repeat, we are buying it ourselves, whether you go in or not, but just to show you that we are a good bunch of scouts we will let you go 50-50 on the above deal." The letter also stated that the company was "putting up $5000 this afternoon.*** There will be no mortgage to sign."

Plaintiff's Florida attorney, Mr. Bryan, testified that the sale was consummated "around March 9." On this date the notes, part of which are the subject matter of this controversy, were executed and delivered to plaintiff by the Palm Beach Real Estate Company by George C. Moore, president, under seal, and also a mortgage by the same company to secure these notes, and a deed was delivered by plaintiff running to the Palm Beach Real Estate Company. March 16th Townsend wrote to the Palm Beach Company accepting the proposition to take a half interest in the property and enclosing checks of Mr. Perry and of himself as an initial payment. On account of some objections to the title of plaintiff a portion of the cash payment was not made by the Palm Beach Company until about April 1.

The trial court could properly conclude that when the first letter was written to the defendants by the Palm Beach Real Estate Company on March 7th, the company had already contracted with plaintiff to buy the land. The statement that the company was "putting up $5000 this afternoon," among other like expressions, proves this. It is pertinent to suggest that, although this contract was in writing, it was not produced by plaintiff upon the trial. The letter of March 7th was an offer to let defendants have a one-half interest in the transaction. The statement, "we are buying it ourselves, whether you go in or not," shows that the sole

property. The letter further stated that the company must retain full power to sell the property without consulting the defendants, and, "Now, if you want to go in this way, get busy. I repeat, we are buying it ourselves, whether you go in or not, but just to show you that we are a good bunch of scouts we will let you go 50-50 on the above deal." The letter also stated that the company was "putting up $5000 this afternoon.... There will be no mortgage to sign."

Plaintiff's Florida attorney, Mr. Myron, testified that the deal was consummated "around March 9," on this date the notes, part of which are the subject matter of this controversy, were executed and delivered to plaintiff by the Palm Beach Real Estate Company by George C. Moore, President, under seal, and also a mortgage by the same company to secure these notes, and a deed was delivered by plaintiff running to the Palm Beach Real Estate Company. March 10th Townsend wrote to the Palm Beach Company accepting the proposition to take a half interest in the property and enclosing checks of Mr. Perry and of himself as an initial payment. On account of some objections to the title of plaintiff a portion of the cash payment was not made by the Palm Beach Company until about April 1.

The trial court could properly conclude that when the first letter was written to the defendants by the Palm Beach Real Estate Company on March 7th, the company had already contracted with plaintiff to buy the land. The statement that the company was "putting up $5000 this afternoon," among other like statements, proves this. It is pertinent to suggest that, although this contract was in writing, it was not produced by plaintiff until upon the trial. The letter of March 7th was an offer to let defendants have a one-half interest in the transaction. The new count, "we are buying it ourselves, whether you go in or not," shows that the main

purchaser was the Palm Beach Real Estate Company. The court could find that the purchase was consummated about March 9th, when the notes with the mortgage were executed and delivered by this company, which was about a week before the defendants indicated a willingness to go into the matter. The interest and some of the notes were paid by the Palm Beach Real Estate Company. Plaintiff testified that he did not know whether Perry and Townsend were associated with the Palm Beach Company in the purchase of the property. The record will not justify a conclusion that Perry and Townsend were joint adventurers in the purchase of the land.

Another reason why plaintiff cannot prevail is that under the Negotiable Instruments Act only the parties to the paper are liable on it. Paragraph 30, chapter 38, provides that, "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided." The exceptions referred to do not include such notes as are here under consideration. The People v. Michigan Avenue Trust Co., 229 Ill. App. 512.

The court properly excluded subsequent letters with reference to the dealings between the defendants and the Palm Beach Real Estate Company. Undoubtedly Perry and Townsend were interested in the matter after March 16th, but letters after this date would not be relevant touching any claim that they were liable on the notes. They could not in any manner establish any privity of contract with the plaintiff.

Plaintiff presents a number of cases touching partnership relations, but these cases for the most part involve chancery proceedings for an accounting, in which, of course, all of the correspondence between the alleged partners is competent. Such citations are not in point in the case before us, where plaintiff seeks in an action of law to hold defendants obligated upon the

purchaser was the main owner [illegible] Company. The courts could find that the purchaser was [illegible] with which the notes with the mortgage were executed [illegible] by this company, which was about [illegible] the intermediaries indicated a willingness to [illegible] the matter. The letter [illegible] the notes were sold by [illegible] a [illegible] mortgage company. Liability [illegible] and were associated with [illegible] purchase of the property. The [illegible] that [illegible] and Tomasend were joint [illegible] the [illegible] land.

[illegible] under the [illegible] are liable on [illegible] operations [illegible] warrant is liable on the [illegible] [illegible] theory, [illegible] exceptions [illegible] court's [illegible] [illegible] Ass. [illegible].

[illegible] reference [illegible] the [illegible] Land [illegible] interested in the [illegible] data should not be [illegible] liability of the [illegible] privity of [illegible].

[illegible] marital relations, [illegible] observing [illegible] the [illegible] claimant [illegible] seeks to [illegible]

notes.

It is said that the subsequent letters of the parties are admissible as tending to support the second count which claims a recovery for the unpaid balance of the purchase price. As we have already said, the sale to the Palm Beach Real Estate Company was consummated some appreciable time before Perry and Townsend went into the matter. The plaintiff had accepted the Palm Beach Company as the purchaser and the contract of purchase had been executed. We know of no rule of law which would permit a recovery against parties subsequently acquiring an interest in the matter.

There can be no recovery on the theory that the Palm Beach Company signed the notes as agents for Perry and Townsend. Where an agent signs a note which is accepted by the payee and it subsequently develops that the agent was acting for an undisclosed principal, it has been held that no action will lie against the principal. Ranger v. Thalmann, 82 N. Y. S. 846; Cragin v. Lovell, 109 U. S. 194. And that is true of contracts. Walsh v. Murphy, 167 Ill. 228; Gardner v. Shekleton, 233 Ill. App. 333.

Some complaint is made because the witness Brady was not permitted to take the stand for the third time to modify his previous testimony as to the time the sale was consummated. This witness had failed to produce the original contract of sale and had already testified as to the date it was consummated. It is largely within the discretion of the trial court whether or not a witness shall be recalled. Anderson Transfer Co. v. Fuller, 174 Ill. 221. The trial court committed no error in this respect. Even if the witness had testified that the papers were first placed in escrow but not actually delivered until after April 1, it would not change the legal situation. The liability of the maker of the notes is fixed at the time of the escrow. Smith v. Goodrich, 167 Ill. 46. And if plaintiff delivered his deed in escrow, it was

notes.

It is said that the subsequent indorsee of the notes are admissible as evidence to support the second count which claims a recovery for the unpaid balance of the purchase price. As we have already said, the sale to the Palm Beach Real Estate Company was consummated some considerable time before Perry and Townsend went into the market. The plaintiff had accepted the Palm Beach Company as the purchaser and had contract of purchase and sale executed. To hold of no rule of law which would permit a recovery against parties subsequently acquiring an interest in the notes.

There can be no recovery on the second count for the Palm Beach Company claimed the notes from Perry and Townsend. Where an unauthorized act of an agent is ratified by the owner and it subsequently develops that the agent was acting for an undisclosed principal, it has been held that the ratification relates back to the act and the principal is bound. Harper v. Tillman, [illegible] Ga. [illegible] (Ga. App.), 109 S. E. 124. So the law is true of indorsees. Leigh v. Lynch, 187 Ill. 238; Hickman v. Weatherby, 88 [illegible] App. [illegible].

Here very similar to remarks the [illegible] by was not permitted to [illegible] the [illegible] to modify his previous [illegible] Perry at the time the sale was consummated. This he had failed to do, so the subsequent attempt of this and had already [illegible] it [illegible] was consummated. It is [illegible] within the discretion of the [illegible] court [illegible] witness must be [illegible]. Anderson Tumbler [illegible] v. Phillips, 174 Ill. 101. The trial court [illegible] to exclude evidence. Even if the witness had testified [illegible] the [illegible] were "first given to secure but not actually delivered until after [illegible], [illegible] not change the legal relation. The liability [illegible] of the notes is fixed at the time of the sale. Smith v. Goulding, 107 Ill. 45. And if plaintiff delivered the [illegible] to [illegible], it was

beyond his power to recall it. German-American Bank v. Martin, 277 Ill. 629; Gronewald v. Gronewald, 304 Ill. 11. The sale was a concluded transaction on March 9th, so far as the liabilities of the parties were concerned.

The evidence does not support plaintiff's claim that defendants Perry and Townsend were engaged in business under the name of Palm Beach Real Estate Company prior to March 16th, or at any other time. They were interested in the profits of the transaction but this is entirely different from holding that they were engaged in business under the name of Palm Beach Real Estate Company.

The only obligation upon the notes or for any unpaid balance rests upon the Palm Beach Real Estate Company alone. We have not discussed all of the points made by respective counsel but have only referred briefly to the underlying facts which seem to us decisive of the issue. We hold that the finding of the trial court was proper, and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

beyond his power to recall it. [illegible] v. [illegible], 177 Ill. 638; [illegible] v. [illegible], 164 Ill. 11. It is not now a contested transaction in which the [illegible] of the parties were concerned.

The evidence does not satisfy [illegible] that defendants Perry and Tennyson were engaged in business under the name of [illegible] when [illegible] prior to March 1874, or at any other time. They were interested in the profits of the transaction for sale in [illegible] different from selling that they were engaged in business under the name of [illegible] and [illegible].

The only obligation upon the notes or for any money borrowed upon the faith thereof [illegible] [illegible]. We have not discussed all [illegible] cases [illegible] but have only referred briefly to the [illegible] which seem to us decisive of the [illegible]. We [illegible] of the trial court was proper, and the judgment is affirmed.

AFFIRMED.

Mathews and [illegible], J., dissent.

33884

PETER SIWINSKI, KATIE SIWINSKI
and STANLEY LAKOMIAK,
Appellants,

vs.

GEORGE STASZAK,
Appellee.

255 I.A. 335

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURLEY
DELIVERED THE OPINION OF THE COURT.

This is something of a companion case to Pioneer Realty Co. v. Staszak, number 33739, in which an opinion has been filed this day. In the present case upon trial the verdict was in favor of the defendant; from the judgment thereon plaintiffs appeal.

The contract of the plaintiffs with the defendant was for the exchange of their respective real properties and recited that each party thereto had executed a judgment note for $5,000 as liquidated damages in case either party refused to perform its part of the contract. In this case plaintiffs took judgment against defendant by confession on the $5,000 note given by him, which judgment was subsequently vacated and defendant given leave to defend.

It is admitted that defendant refused to go through with the exchange of property for the reason, as he claims, that he was to receive a certain amount in cash which was not forthcoming. The court was evidently of the opinion that the contract was so vague and indefinite as to be unenforceable and upon motion directed the jury to return a verdict in favor of defendant, and judgment was entered accordingly.

In the prior case we held the contract to be unenforceable and in our opinion said:

"The contract provides that defendant agreed to convey his property on Marshfield avenue at a price of $49,000 clear, and the other parties agreed to convey the South Redzie avenue property at $37,000, subject to encumbrances of $17,000. The contract

PETER SIMINENI, RATIK SIMINENI
and MANIKY LAKOMIAN,
Appellants,

vs.

GEORGE STRESEN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

This is construction of a conditional sale contract in Pioneer Realty Co. v. Simineni, number 33720, in which an opinion has been filed this day. In the present case upon trial the verdict was in favor of the defendant; from the judgment thereon plaintiffs appeal.

The contract of the plaintiffs with the defendant was for the exchange of their respective real properties and recited that each party thereto had executed a judgment note for $5,000 as liquidated damages in case either party refused to perform its part of the contract. In this case plaintiffs took judgment against defendant by confession on the [illegible] note given by him, which judgment was subsequently vacated and defendant given leave to defend.

It is admitted that defendant refused to go through with the exchange of property for the reason, we be claim, that he was to receive a certain amount in cash which was not forthcoming. The court was evidently of the opinion that the contract was so vague and indefinite as to be unenforceable and upon motion directed the jury to return a verdict in favor of defendant, and judgment was entered accordingly.

In the prior case we held the contract to be unenforceable and in our opinion said:

"The contract provides that defendant agreed to convey his property on Kenilworth avenue at a price of $[illegible], and the other parties agreed to convey the South Lawndale avenue property at $37,000, subject to encumbrances of $17,000. The contract

provides that the seller (the defendant) agrees 'to procure a first mortgage of about $18,000.00 or more and for not less than 3 years or for 5 years if possible with interest at 6% per annum, payable semi-annually.' A similar indefiniteness as to the mortgage was held to make the contract unenforceable in Sluka v. Bielicki, 335 Ill. 202; London v. Doering, 325 Ill. 589.

"The contract further proceeds: 'The seller also agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser on his property.' This is ambiguous. A slight consideration shows that it cannot mean literally what it says. The price at which the seller's property was fixed was $40,000 clear. The price of the purchasers' property was $37,000, subject to encumbrances of $17,000, leaving the equity of the purchasers' property at $20,000. If the seller placed a mortgage of $18,000 on his property, his equity would be $31,000. The difference between the equity of the purchasers - $20,000 - and the amount of the first mortgage of $18,000, which the contract provides for, is $2,000, but the actual difference between the $20,000 equity of the purchasers and the $31,000 equity of the seller is $11,000. What then becomes of the $9,000, the difference between the $2,000 junior mortgage and the $11,000, the difference in value of the respective equities? The contract does not tell us.

"We are also in doubt as to just what is meant by the agreement for the seller 'to leave to the purchaser a junior mortgage.' On what property is this junior mortgage to be placed? The fact that a fairly close guess might be made as to what was intended does not make the contract definite and enforceable."

It is well settled for a contract to be binding it must be definite in all its provisions and this is particularly

provides that the seller, the defendant, agrees 'to procure a first mortgage of about $18,000.00 or more and for not less than 3 years or for 5 years if possible with interest at 6% per annum, payable semi-annually.' A similar indefiniteness as to the mortgage was held to make the contract unenforceable in Clark v. Whitford, 324 Ill. 304; Jordan v. Overton, 325 Ill. 8ff.

"The contract further provides: 'The seller also agrees to leave to the purchaser a junior mortgage which is to be a purchase money mortgage for the difference between the said first mortgage and the equity of the purchaser on his property.' This is ambiguous. A right construction would be: if he owned more than ultimately what it says. The price at which the seller's property was fixed was [illegible] dollars. The price of the purchaser's property was $27,000, subject to encumbrances of $17,[illegible], leaving the equity of the purchaser's property at $9,[illegible]. If the seller placed a mortgage of $18,000 on his property, his equity would be $[illegible]. The difference between the equity of the purchaser - $9,[illegible] - and the amount of the first mortgage of $18,000, plus the amount he agrees to provide for, is $[illegible], or the amount differences between the $25,000 equity of the purchaser is [illegible] equity of the seller is $[illegible]. Most than [illegible] the $[illegible], [illegible] between the $[illegible] junior mortgage and the $[illegible], the difference in value of the reciprocative contract. [illegible] not [illegible] we.

"We are also in doubt as to [illegible] by the expression [illegible] 'a junior mortgage' [illegible] mortgage." [illegible] property is [illegible] to be [illegible] The fact that [illegible] intended that [illegible] interest.'

It is well settled for a contract to be binding it must be definite in all its [illegible] and this is particularly

true where real estate is involved. Gusik v. Tomczak, 197 Ill. App. 484; Breitenstein v. Independent Button & Machine Co., 192 Ill. App. 399; Radzinski v. Ahlswede, 188 Ill. App. 513; Mason v. Leith, 60 Ill. App. 527; Church v. Noble, 24 Ill. 292; Canteberry v. Miller, 76 Ill. 355; Sluka v. Bielicki, 335 Ill. 202; Young v. Farwell, 146 Ill. 466; Hamilton v. Harvey, 121 Ill. 469; Zahrzewski v. Fisher, 278 Ill. 557.

We hold that the instant contract is so vague and indefinite in its terms as to be unenforceable.

For the reason indicated we hold that the trial court properly instructed for the defendant and the judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

true where real estate is involved. Smith v. Greene, 197 Ill. 488; Pittsburgh v. Independent Nation & Sporting Co., 202 Ill. App. 379; Jackson v. Milwaukee, 144 Ill. App. 613; Ryan v. Leigh, 60 Ill. App. 627; Dorton v. Noble, 64 Ill. 401; Chicago v. Wall, 98 Ill. 338; Hinds v. Keith, 158 Ill. 232; Young v. Harrell, 146 Ill. 189; Hamilton v. Avery, 143 Ill. 456; Northrop v. Hickey, 270 Ill. 489.

We hold that the instant contract is so vague and indefinite in its terms as to be unenforceable.

For the reason indicated we hold that the trial court properly instructed for the defendant and the judgment is affirmed.

AFFIRMED.

McSorley and Gleason, JJ., concur.

33544

255 I.A. 633

JOHN E. KNECHTEL,
Defendant in Error,

vs.

CHARLES H. SHAPIRO et al.,
Plaintiffs in Error.

CURTIS J. HOOPER,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

John E. Knechtel filed a bill against Charles H. and Sarah Shapiro and others to foreclose a trust deed which conveyed lots 24, 25 and 26 in block 4 in Benedict's subdivision, Chicago, to secure notes of the Shapiros representing an indebtedness of $2,000. Judgment creditors and other parties interested were made defendants, were served, appeared and answered.

The Shapiros filed a plea which, however, was never set for hearing. The cause was put at issue and without objection referred to a master, who heard the evidence and made a report, to which no objections were filed before the master or exceptions before the chancellor.

The bill was filed December 16, 1927. Pending the proceedings, without objection a receiver was appointed for the premises, which were improved and in part occupied by the Shapiros. On August 31, 1928, without objection from any party, a decree of foreclosure was entered. The master sold the premises and filed his report of sale and distribution, showing payment to complainant of $6121.62 and a deficiency due to complainant of $89.52, for which, without objection, judgment was entered and the report (also without objection from any of the parties) approved. On January 4, 1929, again without objection, an order was entered that the receiver pay a coupon note of $315 due on the first mortgage.

[illegible]

JOHN E. BRACKETT,
Defendant in error.

vs.

CHARLES E. BRAUNO et al.,
Plaintiffs in error.

CHARLES C. HOOVER,
Plaintiff in error.

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

John E. Brackett filed a bill against Charles C. and Sarah Hooper and others to foreclose a first and third mortgage dated 24, 25 and 26 in block 4 in Brackett's subdivision, amounting to coupon notes [illegible] $2,500. Judgments [illegible] were made defendants, were [illegible] as sureties.

The [illegible], however, was never set for hearing. The case [illegible] without objection relied referred to a master [illegible] evidence and made a report, to which no objections were [illegible]. Before [illegible] or exceptions [illegible] the decree.

The bill was filed [illegible], 1873. [illegible] proceedings, without objection [illegible] for the premises, which were [illegible] by the master. On August 21, 1875, [illegible] foreclosure was [illegible] ble report [illegible] ment of $[illegible] walsh, without objection. [illegible] without objection [illegible] 1880, again without objection, [illegible] pay a coupon note of $[illegible].

On May 7, 1929, Hooper, who was not a party of record in the trial court, sued out this writ of error. In his assignments of error he asserts that he is a terre tenant, a successor in interest of the Shapiros and an assignee of certain of the judgment creditors. He prosecutes this writ of error alone, an order of severance having been entered as to all the defendants.

The notes which the trust deed was given to secure were judgment notes, and the bill avers that prior to the filing thereof on September 6, 1927, he confessed judgment upon the same for $2317.49, but that complainant had received no moneys or payment on the judgment whatever; that a bailiff's sale was had of the real estate and that complainant purchased the same and received a certificate of sale from the bailiff; that this certificate was recorded and was held by complainant as further security for the payment of the notes.

The plea of the Shapiros averred that a judgment had been entered upon the notes and that an execution issued and was levied on lots 24, 25, 26 and 27 in block 4, wherefore they denied the jurisdiction of the court, and Hooper now contends in this court that the notes and mortgage were discharged by reason of these proceedings on the part of complainant. This is the principal error assigned and argued. Authorities from other states are cited, which we do not deem it necessary to discuss at length since it is the well established rule in this state, regardless of what the rule may be elsewhere, that the remedies by foreclosure of a mortgage in equity and a suit upon an indebtedness secured by a mortgage at law, are concurrent remedies; that the same may be followed simultaneously or successively and that the exercise of one remedy does not bar the other. Fish v. Glover, 154 Ill. 86; Hazle v. Bondy, 173 Ill. 302; Henry v. Hodge, 171 Ill. App. 10; Chicago Title & Trust Co. v. Edens, 187 Ill. App. 238.

On May 7, 1928, Hooper, who was not a party of record in the trial court, sued out this writ of error. In his assignments of error he asserts that he is a bona fide bonafide, a successor in interest of the Employer and an assignee of certain of the judgment creditors. He prosecutes this writ of error alone, an order of severance having been entered as to all the defendants.

The notes which the trial court was given to secure were judgment notes, and the bill avers that prior to the filing thereof on September 6, 1927, he confessed judgment upon the same for $2317.49, but that complainant had received no money or payment on the judgment whatever; that a bailiff's sale was had of the real estate and that complainant purchased the same and received a certificate of sale from the bailiff; that this certificate was recorded and was held by complainant as further security for the payment of the notes.

The plea of the Employer averred that a judgment had been entered upon the notes and that an execution issued and was levied on lots 24, 25, 26 and 27 in block 4, wherefore they denied the jurisdiction of the court, and hooper has contends in this court that the notes and mortgage were discharged by reason of these proceedings on the part of complainant. This is the principal error assigned and argued. Authorities from other states are cited, which we do not deem it necessary to discuss at length since it is the well established rule in this state, regardless of what the rule may be elsewhere, that the remedies by foreclosure of a mortgage in equity and a suit upon an indebtedness secured by a mortgage at law, are concurrent remedies; that the same may be followed simultaneously or successively and that the exercise of one remedy does not bar the other. Kirk v. Glover, 154 Ill. 32; Harris v. Sandy, 173 Ill. 302; Harris v. Hoke, 177 Ill. App. 10; Citizens Title & Trust Co. v. Adams, 180 Ill. App. 254.

The master in his statement of the account between the parties found that complainant was entitled to an allowance of $2520 for repairing the building, decorating the flats and for installing a new radiator, window frames and two Arcola heaters; that complainant advanced said sum by an order or court first had and obtained; that the advances were necessary and proper under the terms of the trust deed and should be allowed as a part of the principal indebtedness, and the decree makes the same final.

Hooper contends that the court erred in decreeing that this sum should be added to the indebtedness of complainant, and says that there is no allegation in the bill, finding by the master or a decree, or any evidence showing that the trust deed authorized complainant to make such repairs on the premises and to charge the same as additional indebtedness; that there is no proof or finding that the amount alleged to have been paid was the fair, customary and usual charge for such repairs or that the same were necessary to preserve the security of Knechtel. Attached to the bill is a copy of the trust deed by which Shapiro was obligated to keep the premises in repair.

The questions of fact, we think, (assuming that plaintiff in error has the right to be heard upon the issue) may not be considered in the absence of objections before the master or exceptions before the chancellor. Walker v. C. M. & N. R. Co., 199 Ill. App. 610; Gehrke v. Gehrke, 190 Ill. 166. We are not unaware that this rule does not apply where only the legal conclusion of the master is questioned as a proposition of law. Strang v. Allen, 44 Ill. 428; Von Platen v. Winterbotham, 203 Ill. 198; Gillett v. Chicago Title & Trust Co., 230 Ill. 373.

The decree of the Circuit court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

The master in his statement of the account between the parties found that compliance was entitled to an allowance of $2000 for repairing the building, decorating the flats and for installing a new radiator, window frames and two circular heaters, that complainant advanced said sum by an order on court first had and obtained; that the advances were necessary and proper under the terms of the trust deed and should be allowed as a part of the principal indebtedness, and the decree stands the same final.

Cooper contends that the court erred in concluding that this sum should be added to the indebtedness of complainant, and says that there is no allegation in the bill, finding by the master or a decree, or any evidence showing that the trust deed authorized complainant to make such repairs on the premises and to charge the same as additional indebtedness; that there is no proof or finding that the amount alleged to have been paid was the only necessary and usual charge for such repairs or that the same were necessary to preserve the security of bondholders. Attached to the bill is a copy of the trust deed by which chapter was obligated to keep the premises in repair.

The statutes of Illinois [illegible] that [illegible] in error [illegible] may not be [illegible] alleged in the absence of objection before the master or exceptions before the master. [illegible] 1911, App. 610; [illegible] 1 Ill. App. [illegible] 1 Ill. [illegible] 1 Ill. [illegible] 1 Ill. [illegible] 44 Ill. 429; Von Platen v. Winterhoff, 44 Ill. 158; [illegible] v. Chicago Title & Trust Co., 220 Ill. 277.

The decree of the [illegible] is [illegible].

Affirmed.

[illegible], P. J., and [illegible], J., concur.

33601

F. J. WILLIAMS, EDWARD BERNAHL and GERALD A. ROLFES,
Plaintiffs in Error,
vs.
JOSEPH E. DAILY, DRUSILLA R. DAILY and FRANCIS L. DAILY,
Defendants in Error.

255 A.L. 235

ERROR TO CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On August 10, 1926, complainant Joseph E. Daily filed in the Circuit court of Cook county a creditor's bill based upon a judgment in his favor and against defendant F. J. Williams, entered in the Circuit court of Peoria county on November 6, 1925.

The bill stated that the judgment was for the sum of $15,920 and costs; that a transcript of the judgment was duly filed and docketed in the office of the clerk of the Circuit court of Cook county; that execution issued against the defendant and was delivered to the sheriff of Cook county, where defendant resided, and was by the sheriff returned wholly unsatisfied, he certifying that he could find no property in his county whereonto levy or to make any part of the amount thereof.

The other averments usually made in bills of this kind were also set forth, and Edward Bernahl and Gerald A. Rolfes were made defendants, it being averred that they held in their names real estate which was in fact the property of the principal debtor, Williams, and which should be subjected to the satisfaction of the judgment.

Summons issued against the defendants and was returned as served upon Williams on August 14, 1926.

Defendant Rolfes appeared and answered, denying that he held any property belonging to Williams.

Bernahl answered, admitting that certain premises

F. C. WILLIAMS, ERNEST BERGAN,
and GERALD A. HEINES,
Plaintiffs in Error,

vs.

LORENZO E. DALEY, VERGILIA C.
DALEY and FRANCIS L. DALEY,
Defendants in Error.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On August 10, 1928, complainant Joseph G. Daley filed in the Circuit court of Cook county a creditor's bill based upon a judgment in his favor and against defendant F. C. Williams, entered in the Circuit court of Peoria county on November 5, 1928.

The bill stated that the judgment was for the sum of $18,250 and costs; that a transcript of the judgment was duly filed and docketed in the office of the clerk of the Circuit court of Cook county; that execution issued against the defendant and was delivered to the sheriff of Cook county, where defendant resided, and was by the sheriff returned wholly unsatisfied, he certifying that he could find no property in his county whereon to levy or to make any part of the amount thereof.

The other averments usually made in bills of this kind were also set forth, and defendants Ernest A. Bergan and Gerald A. Heines were made defendants, it being averred that they claimed to have real estate which was in fact the property of the original debtor, Williams, and which should be subjected to the payment of the judgment.

Summons issued against the defendants and was returned as served upon Williams on August 14, 1928.

Defendant Heines answered and disclaimed, saying that he held any property belonging to Williams.

Bergan answered, admitting that certain premises

described in the bill, to which he held the record title, were held by him for the use and benefit of defendant Williams.

Williams answered, averring that, except by the bill of complaint he had not been informed as to the entry of the judgment, the filing of the transcript thereof in Cook county or the return of the execution nor as to whether the judgment was in full force and unsatisfied, but denying that the full amount of the judgment was equitably due. He admitted that Bernahl held the title to the real estate in question in trust for him and that he was the sole owner of it subject to certain liens and certain other equitable proceedings.

A further defense interposed by the answer was that complainant practiced fraud in entering judgment on the note, which was a judgment note. The answer of Williams averred that the note was delivered to Francis L. Daily, a brother of complainant; that at the time the note was delivered Bernahl had executed and acknowledged a deed conveying the premises, with the name of the grantee left blank; that the said note and deed were delivered to Francis L. Daily under an agreement that he, Williams, should pay the note, or in case he did not that Francis L. Daily had full authority from him to fill in the name of the grantee in said deed and accept the deed in full payment and satisfaction and discharge of said note, which in such case should be cancelled and surrendered; that Francis L. Daily during the absence of Williams from the State of Illinois and without his knowledge and consent, and contrary to his agreement, filled in the blank in the deed with the name of complainant as grantee and filed the deed for record in Cook county on October 16, 1925, and that by reason thereof the note was fully satisfied and discharged and should have been cancelled and surrendered instead of judgment being entered thereon.

Exceptions to this answer for scandal and impertinence

described in the bill, to which is held the trust [illegible], were held by him for the use and benefit of defendant Williams.

Williams answered, averring that, except by the bill of complaint he had not been informed as to the entry of the judgment, the filing of the [illegible] interest in [illegible] county or the return of the execution nor as to whether the judgment was in full force and unsatisfied, but averring that the bill amount of the judgment was equitably due. He admitted that Dolomite Milling Co. is the real owner in question in trust for him and that he was the sole owner of it subject to certain liens and certain other equitable proceedings.

A further answer was filed by the defendant that complainant presented [illegible] in enforcing judgment on the note, which was a judgment note. The owner of Williams averred that the note was delivered to Francis L. Daily, [illegible] of complainant; that at the time the note was delivered [illegible] and executed was mortgaged [illegible] covering the premises, with the [illegible] of the premises left blank; that the note [illegible] delivered to Francis L. Daily under an [illegible] agreement, Williams, would pay the note, or in case he did not [illegible] Francis L. Daily had [illegible] authority from him to fill in the [illegible] and record the deed in full according to [illegible] of said note, which [illegible] made [illegible] that Francis L. Daily during the absence of Williams [illegible] of Illinois and without [illegible] his agreement, filled in the blank [illegible] on October 19, 1928, and [illegible] by [illegible] satisfied and discharged [illegible] transferred instead of [illegible].

Exceptions to bill [illegible]

were filed by the complainant, which were sustained, except the first, second, fourth and fifth paragraphs, and the clerk ordered to expunge the scandalous and impertinent matters, on January 3,1927.

On January 8, 1927, defendant Williams filed a cross-bill making defendants thereto the complainant Joseph E., Francis L. and Drusilla R. Daily. It set up in substance the same matters which had been expunged; averred that the deed was in fact a mortgage, and prayed an accounting of the rents, that cross-defendants might be decreed to pay the amount found due and convey the premises to cross-complainant, and that in default of such payment the premises might be sold as in foreclosure proceedings; or in the alternative, that cross-complainant be directed and decreed to forthwith satisfy and discharge of record the judgment and for other and further relief.

To this cross-bill cross-defendants filed general and special demurrers, which were sustained.

The cause was referred to a master, who reported finding that the equities were with the complainant; that the judgment was in full force and effect; that the real estate ought in equity and good conscience be applied to the satisfaction of the judgment.

Objections filed by defendants were overruled by the master, and by order of the chancellor these objections stood as exceptions on the hearing before him. The exceptions were overruled and a decree entered in favor of complainant, which defendant Williams seeks by this writ of error to have reversed.

While these proceedings were pending in the Circuit court of Cook county, Williams made a motion in the Circuit court of Peoria county to set aside the judgment. The motion was denied and upon appeal by Williams to the Appellate court for the second district, the judgment of the trial court was affirmed. Daily v.

were filed by the complainant, which were sustained, except the first, second, fourth and fifth paragraphs, as the claim and demand to secure the cancelation and impeachment matters, on January 3,1877.

On January 6, 1877, defendant Williams filed a cross-bill seeking determination between the complainant Joseph A., Francis L. and Lucilla R. Duffy. It set up in substance the same matters which had been answered; averred that the deed was in fact a mortgage, and prayed an accounting of the rents, that cross-defendants might be decreed to pay the amount found due and money the premises to cross-complainant, and that in default of such payment the premises might be sold as in foreclosure proceedings; or in the alternative, that cross-complainant be decreed was decreed to foreclose subject to redemption or record the judgment and for other and further relief.

To this cross-bill cross-defendants filed general and special demurrers, which were sustained.

The cause was referred to a master, who reported finding that the consideration [illegible] judgment was in full force [illegible]; that the [illegible] in equity and good conscience be applied to the satisfaction of the judgment.

Objections filed by defendants were overruled by the master, and by order of the chancellor these objections were in exceptions on the hearing before him. The exceptions were overruled and a decree entered in favor [illegible] Williams seeks by this writ of error to have [illegible].

While these proceedings were pending in the circuit court of Cook county, Williams [illegible] of Peoria county [illegible] and upon appeal by Williams in the [illegible] district, the judgment of the trial [illegible].

Williams, 248 Ill. App. 669.

The sole question to be determined upon this record is whether, under circumstances such as are here made to appear, the judgment debtor defendant to a creditor's bill may attack successfully the judgment upon which the creditor's bill is based. The averments of the answer, as well as those of the cross-bill, disclose, if true, that he had a perfect defense at law to the suit in which judgment was entered in Peoria county. That judgment was entered by confession does not lessen the presumption which exists in its favor. Goodwin v. Mix, 38 Ill. 115; Boyles v. Chytraus, 175 Ill. 370; Mason v. Griffith, 281 Ill. 246.

It is true that a court of equity has the power upon proper showing to set aside a judgment which has been obtained by fraud or as the result of accident or mistake, where the defendant to the judgment has not been guilty of negligence. Such is the general rule in the cases cited by defendant. Foote v. Dospain, 87 Ill. 28; Loughlin v. Mulkey, 244 Ill. App. 646. In the latter case the court said:

> "It is the general rule that where a court of equity has jurisdiction of the parties and the subject matter of the litigation, it has authority for the purpose of administering equitable relief to adjudicate all the rights of the parties which are involved in the litigation. Old Colony Life Insurance Co. v. Graves, 200 Ill. App. 71; Roman v. Humphreys, 220 Ill. App. 502, and cases there cited. It is well established that a court of equity has jurisdiction to set aside a judgment at law upon proper showing. Hubbard v. National Stamping & Electric Works, 213 Ill. App. 235; Harding v. Hawkins, 141 Ill. 572; Friedberg v. DePew, 200 Ill. App. 397; Simpson v. Simpson, 273 Ill. 90."

There is, however, nothing in any of these cases which can be construed to hold that a defendant, who has failed to avail himself of the opportunity to present his defense in a court of law can, when proceedings are brought upon that judgment in a court of equity, be allowed to present the defense which he failed to interpose. It is distinctly held in Hultenberg v. Anderson, 242 Ill. 607,

Williams, 242 Ill. App. 666.

The sole question to be determined upon this record is whether, under circumstances such as are here made to appear, the judgment debtor defendant to a creditor's bill may allege successfully the judgment upon which the creditor's bill is based. The averments of the answer, as well as those of the cross-bill, disclose, if true, that he had a perfect defense at law to the suit in which judgment was entered in Peoria county. That judgment was entered by confession does not lessen the presumption which exists in its favor. Goodwin v. Ely, 35 Ill. 116; Burlew v. Quisenberry, 175 Ill. 370; Hagen v. Griffith, 201 Ill. 246.

It is true that a court of a city has the power upon proper showing to set aside a judgment which was been obtained by fraud or as the result of accident or mistake, where the defendant to the judgment has not been guilty of negligence. Such is the general rule in the cases cited by defendant. Joyce v. Kopsch, 87 Ill. 26; Lounsbury v. Sulzer, 244 Ill. App. 616. In the latter case the court said:

> "It is the general rule that where a court of equity has jurisdiction of the parties and the subject matter of the litigation, it has authority for the purpose of adjudicating equitable relief to adjudicate all the rights of the parties which are involved in the litigation. Old Colony Life Insurance Co. v. Durand, 300 Ill. App. 91; Hagen v. Lundquist, 200 Ill. 400, 405, and cases there cited. It is well established that a court of equity has jurisdiction to set aside a judgment at law upon proper showing. Mulhern v. National Temperance & Benefit Society, 216 Ill. 488; Harding v. Hawking, 141 Ill. 272; Hightower v. Dolan, 100 Ill. App. 327; Lane v. Lane, 230 Ill. 4[illegible]

There is, however, nothing in any of the cases which can be construed to hold that a defendant, who has failed to avail himself of the opportunity to present his defense in a court of law can, when proceedings are brought upon that judgment in a court of equity, be allowed to present the defense which [illegible] to [illegible] pass. It is distinctly held in Lillenthal v. Wilkins, 243 Ill. 607,

that it would be inequitable to permit this, and there is a long line of well considered decisions in this and other states holding that such defense may not be interposed in this manner. Elston v. Blanchard, 2 Scam. 421; Newman v. Willitts, 60 Ill. 519; Sawyer v. Meyer, 109 Ill. 461; Thoeming v. Hawkins, 294 Ill. 30; Chiniquy v. Christophel, 318 Ill. 101; Bowman v. Wilson, 64 Ill. App. 73; Tilton v. Goodwin, 183 Mass. 236. In this case there is the additional circumstance that pending these proceedings defendant sought to interpose his legal defense in the Circuit court of Peoria county and that the decision of that tribunal contrary to his contentions was sustained by the Appellate court upon review. Baily v. Williams, 248 Ill. App. 669. It would therefore appear that defendant's contentions have already been adjudicated. Rork v. McDavid, 91 Ill. App. 262; Black v. Thomson, 120 Ill. App. 424. Neither in the answer nor in the cross-bill has defendant stated facts which in a court of equity could be construed as overcoming the presumption in favor of the judgment at law, and the decree of the Circuit court is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

that it would be impossible to permit it, and there is a long line of well considered decisions in this and other states to the that such defense may not be later used in this manner. Hilton v. Blanchard, 2 Gram. 492; Bowman v. Williams, 4 Ill. 518; Harper v. Hayes, 100 Ill. 464; Thomming v. Hawkins, 204 Ill. 7; Dunlavy v. Christopher, 214 Ill. 192; Bowman v. Wilson, 67 Ill. App. 74; Tilton v. Hoehle, 187 Mass. 344. In this case there is the additional circumstance that pending these proceedings defendant sought to interpose his legal defense in the - Court court of Peoria County and that the decision of that tribunal contrary to his contentions was sustained by the Appellate court upon review. Dale v. Williams, 248 Ill. App. 629. It would therefore appear that defendant's contentions have already been adjudicated. Hart v. Hovey, 92 Ill. App. 294; Blair v. Thomson, 170 Ill. App. 424. Neither in the answer nor in the cross-bill has defendant stated facts which in a court of equity could be construed as creating the presumption in favor of the judgment at law, and the decree of the Circuit court is therefore affirmed.

AFFIRMED.

Mulvey, P. J., and Gidwitz, J., concur.

33607

PHILLIP S. BLOOM,
Appellee,

vs.

THE NATHAN VEHON CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant corporation from a judgment in the sum of $25,701.19 entered upon the finding of the court.

The statement of claim alleges that plaintiff was employed by defendant prior to January 1, 1926, and that defendant promised to pay for his services during that year a salary of $10,000; that there was paid on account thereof only $3,130, leaving a balance of $6,870; that plaintiff was likewise employed for the year 1927 at a salary of $15,000 a year; that $4,700 was paid thereon and that there is a balance due of $10,300 for services rendered during that year; that during the year 1928 defendant agreed to pay plaintiff a salary of $15,000 and that plaintiff performed services from January 1, 1928, to November 10, 1928, for which he was paid $4,385.47, leaving a balance of $8,531.19 for that year and making a total balance due of the amount for which judgment was entered.

A bill of particulars which in substance alleged these facts was filed by the plaintiff and stated that these agreements for services to be rendered were made by defendant through its president, Nathan Vehon.

The affidavit of merits denied that any such agreements were made by defendant through its president; averred that for five weeks in 1926 plaintiff was employed for compensation of $50 a week and during the remainder of the year for compensation

33807

PHILLIP S. BROOM,
Appellee,

vs.

THE NATIONAL VABOR CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant corporation from a judgment in the sum of $28,701.10 entered upon the finding of the court.

The statement of claim alleges that plaintiff was employed by defendant prior to January 1, 1930, and that defendant promised to pay for his services during that year a salary of $10,000; that there was paid on account thereof only $5,12[illegible], leaving a balance of $6,870; that plaintiff was likewise employed for the year 1927 at a salary of $18,[illegible] a year; that $4,700 was paid thereon and that there is a balance due of $10,300 for services rendered during that year; that during the year 1928 defendant agreed to pay plaintiff a salary of $13,000 and that plaintiff performed services from January 1, 1929, to November 15, 1928, for which he was paid $4,368.47, leaving a balance of $8,631.10 for that year and making a total balance due of the amount for which judgment was entered.

A bill of particulars later filed in substance alleged these facts was filed by the plaintiff and stated that these agreements for services to be rendered were made by defendant through its president, Ratkem Vabon.

The affidavit of merits denied that any such agreements were made by defendant through its president; averred that for five weeks in 1928 plaintiff was employed for compensation of $50 a week and during the remainder of the year for compensation

of $60 a week, and that he had been paid in full for such services; that in 1927 plaintiff was employed by defendant at the agreed salary of $75 a week; that he was paid the further sum of $600 as a bonus, and that a further sum of $200 was advanced to him during that year as a loan, which had not been repaid; that plaintiff was paid in full for all services rendered during that year; that plaintiff was employed by defendant during the year 1928 for the period commencing January 1, 1928, and ending November 10, 1928; that for a portion of that year defendant agreed to pay plaintiff $75 a week and for another portion of said year a sum of $100 a week; that plaintiff had received a total sum of $4,150 in full payment according to the agreement.

The affidavit further averred that on January 22, 1925, plaintiff became a director of the defendant corporation; that on January 12, 1927, plaintiff became the de facto secretary of the defendant corporation; that as such director and de facto secretary he was not entitled to the amounts claimed except upon the lawful adoption of resolutions by the board of directors of the defendant authorizing the payment of the sums claimed, and that no such resolutions were ever adopted.

This law suit has been fought with the bitterness which usually attends family disagreements. Plaintiff is the brother-in-law of Nathan Vehon, who was the president and treasurer of the defendant corporation. The corporation was organized in Illinois in 1922 or 1923 and was capitalized for the total sum of $10,050 in shares of $10 each, of which only 670 shares have been issued and of which Nathan Vehon owns 650 shares. Its principal business is the manufacture and sale of silk, cotton and rayon underwear, a business in which Nathan Vehon was engaged for more than a year prior to the incorporation of this company.

of $60 a week, and that he had been paid in full for such services; that in 1927 plaintiff was employed by defendant at the agreed salary of $75 a week; that he was paid the further sum of $800 as a bonus, and that a further sum of $800 was advanced to him during that year as a loan, which had not been repaid; that plaintiff was paid in full for all services rendered during that year; that plaintiff was employed by defendant during the year 1928 for the period commencing January 1, 1928, and ending December 31, 1928; that for a portion of that year defendant owed to my plaintiff $75 a week and for another portion of said year a sum of $100 a week; that plaintiff had received a total sum of $4,100 in full payment according to the agreement.

The affidavit further averred that on January 24, 1928, plaintiff became a director of the defendant corporation; that on January 12, 1927, plaintiff became the de facto secretary of the defendant corporation; that he made [illegible] and de facto secretary he was not entitled to the salaries claimed except upon the lawful adoption of resolutions by the board of directors of the defendant authorizing the payment of the same claims, and that no such resolutions were ever adopted.

This law suit has been fought which the litigants would usually attribute family disagreements. Plaintiff is the brother-in-law of Rattan Vahan, who was the president and manager of the defendant corporation. The corporation was organized in Illinois in 1922 or 1923 and was capitalized for the total sum of $[illegible], in shares of $10 each, of which only [illegible] shares have been issued and which Rattan Vahan owns $[illegible] worth. The principal business is the manufacture and sale of silk, cotton and rayon underwear. [illegible] in which Rattan Vahan was engaged for some time a year prior to the incorporation of this company.

The directors of the corporation are Nathan Vehon, the president, and his wife, Lena Vehon, who owns ten shares of the capital stock; her husband gave her this stock as a gift. Nathan Vehon, Lena Vehon and plaintiff, Phillip S. Bloom, were the only stockholders of the corporation. Plaintiff became a stockholder, director and the secretary of the company on January 22, 1925, ten shares having been issued to him by Nathan Vehon in order that plaintiff might qualify as a director of the corporation. The evidence indicates that Nathan Vehon has at all times absolutely controlled the affairs of the defendant corporation.

Plaintiff testifies that in January, 1926, he went to Nathan Vehon and told him that he, plaintiff, wanted a salary of $10,000 a year, and that Vehon replied that was all right with him, that he, Vehon, would also take a salary of $10,000 a year, and that he wanted Mrs. Vehon to draw $5,000 a year.

Plaintiff further says that thereafter Nathan Vehon showed him the minutes of a meeting of the board of directors which purported to fix the compensation of these persons at these sums.

Plaintiff further testified that about January 1, 1927, Nathan Vehon came to him and said that he was going away for a trip on account of the condition of his eyes; that plaintiff then said that there should be some understanding as to salaries; that the net profits of the business were large and that he, plaintiff, thought the salaries for the year 1927 should be $15,000 each; that Nathan Vehon replied that would be all right with him, and that plaintiff should have the accountant draw up the records accordingly; that Nathan Vehon left sometime in January and returned in June; that before leaving he showed plaintiff the minutes, which are in evidence, indicating that the agreement had been carried out.

Plaintiff further testifies that in January, 1928, he told Nathan Vehon that plaintiff's salary ought to be $20,000 a year;

The directors of the corporation are Nathan Vernon, its president, and his wife, Lena Vernon, who owns ten shares of the capital stock; her husband gave her this stock as a gift. Nathan Vernon, Lena Vernon and plaintiff, Philip S. Bloom, were the only stockholders of the corporation. Plaintiff became a stockholder, director and the secretary of the company on January 22, 1923, ten shares having been issued to him by Nathan Vernon in order that plaintiff might qualify as a director of the corporation. The evidence indicates that Nathan Vernon has at all times absolutely controlled the affairs of the defendant corporation.

Plaintiff testifies that in January, 1926, he went to Nathan Vernon and told him that he, plaintiff, wanted a salary of $10,000 a year, and that Vernon replied that was all right with him, that he, Vernon, could also take a salary of $10,000 a year, and that he wanted Mrs. Vernon to draw $5,000 a year.

Plaintiff further says that thereafter Nathan Vernon showed him the minutes of a meeting of the board of directors which purported to fix the compensation of these persons at these sums.

Plaintiff further testified that about June 27, 1929, Nathan Vernon came to him and said that he was going over for a trip on account of the condition of his eyes; that plaintiff then said that there should be some understanding as to salaries; that the net profits of the business were large and that he, plaintiff, thought the salaries for the year 1929 should be $15,000 each; that Nathan Vernon replied that would be all right with him, but that plaintiff should have the accountant draw up the records accordingly; that Nathan Vernon left sometime in January and returned in June; that before leaving he showed plaintiff the minutes, which are in evidence, indicating that the agreement had been carried out.

Plaintiff further testifies that in January, 1932, he told Nathan Vernon that plaintiff's salary ought to be $20,000 a year;

that Vehon objected, saying that the salary should continue at $15,000 and that at the end of the year he would vote some stock dividends. Plaintiff says he told Vehon that was all right with him and to have the accountant draw up the records.

Arthur Weinstein, a public accountant, who kept the books from the beginning of the business until the close of 1927, testified that he wrote the purported minutes of the board of directors meetings of 1926 and 1927 at the direction of the president, Nathan Vehon. He also testified that he prepared the income tax return of the corporation, of Mr. and Mrs. Vehon and of plaintiff for those years. These income tax returns were offered in evidence, are under oath of the respective parties, and show salaries of plaintiff, Nathan Vehon and Mrs. Vehon for the specified years as claimed by plaintiff. The testimony of plaintiff as to the amount of these salaries is also corroborated by entries in the ledger which the evidence indicates were made at the close of the respective years from the minute books.

Plaintiff also testified that the defendant corporation was practically insolvent when he entered its service and that his services had very much to do with securing the increased business which resulted in prosperity.

At the time plaintiff entered defendant's employment it occupied about 750 square feet of floor space, employed about fourteen persons, used about a dozen machines in its business, and its sales in 1924 amounted to $75,000. When plaintiff severed his connections with the company the business occupied 75,700 square feet of floor space, the employees numbered over a hundred and the number of machines had increased to nearly a hundred and the sales to more than $400,000 per annum.

Nathan Vehon testified in detail, denying that the company was insolvent when plaintiff was first employed and denying the

that Vebon objected, saying that the salary should continue at $15,000 and that at the end of the year he would receive some stock dividends. Plaintiff says he told Vebon that was all right with him and to have the accountant draw up the records.

Arthur Weinstein, a public accountant, who kept the books from the beginning of the business until the close of 19[illegible], testified that he wrote the purported minutes of the board of directors meetings of 1956 and 1957 at the direction of the president, Nathan Vebon. He also testified that he prepared the income tax returns of the corporation, of Mr. and Mrs. Vebon for plaintiff for those years. These income tax returns were allowed as evidence, are under oath of the respective parties, and show salaries of plaintiff, Nathan Vebon and Mrs. Vebon for the same 2 and years as claimed by plaintiff. The testimony of plaintiff as to the amount of these salaries is also corroborated by entries in the [illegible] the evidence indicates were entered into the books of the [illegible] from the minute books.

Plaintiff also [illegible] that the business [illegible] was practically insolvent when he entered its service and [illegible] services had very much [illegible] and increased salaries which resulted in [illegible].

At the time plaintiff [illegible]

it occupied about [illegible] square feet of floor space. [illegible] tourteen persons, [illegible] its sales in 1956 amounts to [illegible] connections with the [illegible] feet of floor space, the employees [illegible] number of machine hr [illegible] to more than [illegible] per month.

Nathan Vebon testified in [illegible] company was insolvent when plaintiff was first employed [illegible]

alleged admissions as to the value of plaintiff's services, and in particular he denied the conversations with reference to the salaries to be paid to plaintiff, to which plaintiff testified as hereinbefore recited. He also denied the conversations related by Weinstein, bookkeeper, to the effect that he, Vehon, directed entries in the books of such items. His explanation of these entries is as follows:

> "I had a conversation with Mr. Weinstein about what the salaries for the officers of the company were to be in 1926. In the early part of 1927, and before I left Chicago he came in and said, 'I know something,' he said, 'how to reduce income tax,' and Mr. Weinstein said, 'You can put up $10,000 for Mr. Bloom, $5,000 for Mrs. Vehon and $10,000 for yourself,' and he says, 'You can remain on the books, we need only enter them, but' he said, 'I don't know just how to enter it, but' he said, 'I will look it up and see what I can do.'
>
> "He said, 'They are all doing it.' I said, 'They are all doing it.' I said, 'I don't want to get myself into trouble,' and he said, 'No trouble at all, all you got to do is to do that,' and that is why those salaries were put up like they are."

Nathan Vehon further testifies that after the beginning of this suit he caused amended tax returns to be filed for the particular years in question and paid an additional tax on these amended returns of $7,000.

Joseph A. Weiss, a public accountant employed by defendant, was subpoenaed by plaintiff and in rebuttal testified that in going to work for defendant he asked Mr. Vehon about the back salaries as disclosed by the books and that Vehon said, "They will be drawn up sometime during the year 1928." The witness further testifies that he must have taken the matter up with Mr. Vehon seven or eight times during the year and was told that the salaries would be drawn up, and he further says that Nathan Vehon never said anything to him about the salaries being put on the books for the purpose of reducing the income tax.

Weinstein in rebuttal also denied the alleged conversations with him in regard to reducing income taxes by making

alleged admissions as to the value of Blackwell's services, and in particular he denied the conversations with reference to the emissries to be paid to Plaintiff, to which Plaintiff certifies as hereinbefore recited. He also denied the conversations held by Tarnheim, however, in the affidavit here so, denying, therein entries in the books of such items. His explanation of these entries is as follows:

> "I had a conversation with Mr. Weisheim about that the salaries for the officers of the company were to be $600. in the early part of 1907, and I believe I left instructions to same in and said, 'I know exactly,' he said, 'that we reduce in some way,' and he, Bernstein said, 'You can put up a, for Mr. Blood, $3,000 for life. Tell him we will ... the president,' and he says, 'You can remain on the board, ... ' but he said, 'I don't know just how to do it, but we will look it up and do what ... be.'
>
> "He said, 'Mr. are all doing it.' I said, 'they are all doing it.' I said, 'I don't want to ... ' he said, 'Be stable as ... all you ... to do in that,' and that is why these ... are not in the books ...."

William Vogt, failure [illegible] the [illegible] ...ing of this suit be caused excessive expenditure in the trial in the particular years in question the plaintiff [illegible] these excessive returns of [illegible].

Joseph A. Baier, a public accountant [illegible] by the Plaintiff, was subpoenaed by [illegible] that it going to make for [illegible] such entry in such books as disclosed by the books [illegible] will be drawn up so as to show during the year 19[illegible] [illegible] realized that he must have [illegible] [illegible] waves or flight lines during the [illegible] would be drawn up, [illegible] anything to do with the material [illegible] purpose of reducing the income tax.

Reference is requested upon [illegible] [illegible] relations with one in regard to reducing income [illegible]

entries increasing the salaries, and the testimony of Weiss is not denied by Vehon.

The trial Judge who saw and heard the witnesses stated in making his findings that plaintiff's claim as to these salaries was established beyond a reasonable doubt. Certainly, this court upon review cannot say that the finding of the trial court is against the manifest weight of the evidence.

Propositions of law submitted by defendant have not been abstracted, but defendant in its brief urges upon the authority of People v. Matthiessen, 269 Ill. 499, that the purported stockholders' meeting of January 22, 1926, was void for failure to give notice to Lena Vehon, a stockholder, who, it is not disputed, was not present and did not consent to the holding of the meeting.

Further, on the authority of Voorhees v. Mason, 245 Ill. 256, and Luthy v. Ream, 270 Ill. 170, defendant contends that the purported resolution alleged to have been adopted at a directors' meeting on January 10, 1927, was void in that it gave compensation to an officer of a corporation where the resolution fixing the compensation was carried by his own vote. It is further contended on the authority of Ellis v. Ward, 137 Ill. 509, and St.L.A.& S.R.R.Co.v. O'Hara, 177 Ill 525, that an officer of a private corporation is not entitled to compensation for services rendered unless such compensation is fixed by a by-law or resolution adopted before the rendering of the services. These authorities are not applicable to this record.

The affidavit of merits does not deny the authority of the president Vehon to employ the plaintiff. It questions only the amount of salary which it was agreed should be paid. This defense was therefore waived. Cooper v. Anderson, 246 Ill. App. 1. Moreover, the services which plaintiff performed did not devolve upon him by virtue of his office in the corporation but under the

entitles increasing the salaries, and the testimony of Hines is not denied by Vason.

The trial judge who saw and heard the witnesses stated in making his findings that plaintiff's claim as to these salaries was established beyond a reasonable doubt. Certainly, this court upon review cannot say that the finding of the trial court is against the manifest weight of the evidence.

Propositions of law submitted by defendant were not been abstracted, but defendant in a brief urges upon the authority of Lincoln v. Kettlewell, 70 Ill. App. 490, that the unofficial board holders' meeting of January 22, 1965, was void for failure to give notice to Rosa Vason, a stockholder, who, it is not disputed, was not present and did not consent to the holding of the meeting.

Further, on the authority of Vaughan v. Hagen, 345 Ill. 356, and Lutz v. Zang, 384 Ill. 177, defendant contends that the purported resolutions alleged to have been adopted at a directors' meeting on January 10, 1967, can only be given consideration as an officer of a corporation where the resolution stating that a meeting was carried by his own vote. It is further contended on the authority of Mills v. Ford, 177 Ill. [illegible], and [illegible] v. Lumber, 177 Ill. 386, that an officer of a private corporation is not entitled to compensation for services rendered unless such compensation is given by a by-law or resolution adopted prior to the rendition of the services. These authorities are not applicable to this record.

The affidavit of Hines does not show the president voted in favor of the [illegible] the amount of salary which it was proper [illegible] defendant has [illegible] Hines v. [illegible]. However, the services which plaintiff [illegible] upon him by virtue of his office in the corporation [illegible]

contract for services made with the president of the corporation, who, as a matter of fact, was at all times in absolute control of the corporation itself, and therefore had prima facie authority to bind the corporation of which he was president. Hanover Coal Co. v. Pullen, 137 Ill. App. 559; Bank of Minneapolis v. Griffin, 168 Ill. 314; Trader's Mutual Life Ins. Co. v. Johnson, 200 Ill. 359; Quigley v. MacQueen, 321 Ill. 124; Wolf v. Ideal Sheet Metal Works, 209 Ill. App. 252; Barnes v. All American Inv. Co., 200 N.Y.S. 278; Corpus Juris, vol. 14-A. p. 361.

The propositions urged and cases cited by defendant are not applicable. It is unnecessary to discuss these cases in detail.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

contract for services made with the president of the corporation, who, as a matter of fact, was at all times in absolute control of the corporation itself, and therefore had prima facie authority to bind the corporation of which he was president. Hoover Coal Co. v. Fulton, 187 Ill. App. 359; Bank of Minneapolis v. Antlis, 166 Ill. 314; Trainer & Morris Mfg. Co. v. Jen Sen, 5[illegible] Ill. 4[illegible]; Wolfsky v. Macdonald, 321 Ill. 124; Toll v. Ideal Order & Mfg. Co., 208 Ill. App. 386; Kumke v. All American Inv. Co., [illegible] 278; Corpus Juris, vol. 14-A, p. 463.

The propositions urged and cases cited by appellant are not applicable. It is unnecessary to discuss them here in detail.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

Mosely, P. J., and Sullivan, J., concur.

33686

255 I.A. 636

RICHARD W. GILLIAM,
Plaintiff in Error,

vs.

FLORENCE F. GILLIAM,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, Richard W. Gilliam, brought a suit in replevin to recover possession of a Chevrolet automobile. There was a trial by the court with a finding for defendant. Motions of plaintiff to set aside the finding, for a new trial and in arrest of judgment were denied and judgment on the finding with an order for a writ of retorno habendo were entered.

The principal contention of plaintiff is that the finding of the court is against the weight of the evidence.

Defendant Florence Gilliam is the wife of plaintiff. They separated on September 7, 1928, and a few days thereafter she filed a suit for separate maintenance. This suit in replevin was filed October 4th thereafter.

It is not disputed that plaintiff purchased the automobile in his own name and paid for it with his own money on March 31, 1928, but defendant undertook to prove that plaintiff, after the purchase of the automobile, made a gift of it to her, and the question of whether the evidence sustains this defense is the controlling question in the case.

The undisputed evidence shows (as already stated) that plaintiff purchased the car in his own name on March 31st; that he took out insurance on it in his own name on April 2nd, and that defendant on April 3, 1928, paid to the comptroller of the Village of Maywood, where they resided, the sum of $5 for an auto license, taking receipt therefor in the name of plaintiff and paying for the same out of her allowance from her husband for household ex-

33666

RICHARD W. GILLIAM, Plaintiff in Error, vs. FLORENCE V. GILLIAM, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, Richard W. Gilliam, brought a suit in replevin to recover possession of a Chevrolet automobile. There was a trial by the court with a finding for defendant. Motions of plaintiff to set aside the finding, for a new trial and in arrest of judgment were denied and judgment on the finding with an order for a writ of returno habendo were entered.

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It is not disputed that plaintiff purchased the automobile in his own name and paid for it with his own money on March 31, 1928, but defendant undertook to prove that plaintiff, after the purchase of the automobile, made a gift of it to her, and the question of whether the evidence sustains this defense is the controlling question in the case.

The undisputed evidence shows (as already stated) that plaintiff purchased the car in his own name on March 31st; that he took out insurance on it in his own name on April 2nd, and that defendant on April 3, 1928, paid to the secretary of the Village of Maywood, where they resided, the sum of $3 for an auto license, taking receipt therefor in the name of plaintiff and paying for the same out of her allowance from her husband for household ex-

penses; that thereafter a license was obtained from the secretary of state of Illinois, designating plaintiff as the owner of the car.

The evidence also shows that plaintiff rode in the car quite frequently but did not drive it, and that defendant was the only member of the family who did drive the car. It further appears that some time during April of that year defendant drove the car to the place where it was purchased and had it simonized and that plaintiff paid the bill for this service, which was furnished after the time when defendant says he gave the car to her. She testifies that she, not plaintiff, paid for repairs made on the car (as already stated) out of money given her by plaintiff for household expenses.

Defendant's testimony with reference to the gift is:

> "He said that it was an April fool present and surprise to me. He always said that it was my car. Well, when he gave me the car he said, 'The car is yours,' he said, 'Now, you will have to pay the bills.' I paid the Maywood tax. I went and got it myself. I paid for that out of my own household money. He bought gasoline for that car about twice since the first of April. He never bought oil for the car. He never had the car washed for me. I alone had to pay for the maintenance of the car."

Mrs. Fisher, the wife of defendant's brother, testifies that plaintiff and defendant were at their home on Easter Sunday and that plaintiff said, "Come to the window and see Florence's new car," and she says that they went to the window and that plaintiff pointed it out. She also says that she heard the conversation on May 27th when plaintiff said it was an April fool gift.

The mother of defendant also says that on Easter Sunday plaintiff said, "Come to the window. Come on and see Florence's new car;" and she says that plaintiff pointed out the car to them.

It appears that at the time of the trial a suit was pending, brought by plaintiff against this witness and her husband, which charged them with alienating the affections of his wife. She says, however, "I wish him nothing but the best." The evidence also tends to show that the husband of this witness was present at the

persons; that thereafter a license was obtained from the secretary of state of Illinois, designating plaintiff as the owner of the car.

The evidence also shows that plaintiff rode in the car quite frequently but did not drive it, and that defendant was the only member of the family who did drive the car. It further appears that some time during April of that year defendant drove the car to the place where it was purchased and had it exchanged and that plaintiff paid the bill for this exchange, which was [illegible] after the time when defendant says he gave the car to her. She testifies that she, not plaintiff, [illegible] made on the car (as already stated) out of money given her by defendant for household expenses.

Defendant's testimony, [illegible] to this gift is:

> "He said that it was an April fool present and [illegible]. He always said that it was my car. [illegible] car he said, 'This car is yours, [illegible], you will have to pay the bills.' I paid the [illegible] week and paid it myself. I paid [illegible] bought gasoline for that car [illegible] first of April. He never [illegible] car. He [illegible] washed for me. I alone had to pay for the [illegible] car."

Mrs. [illegible], the wife of [illegible], testifies that plaintiff and defendant [illegible] and that plaintiff said, "[illegible] a new car" and [illegible] it [illegible] when plaintiff said it was [illegible].

"The car is [illegible]" plaintiff said, "[illegible] car;" and she says [illegible].

It [illegible] pending, brought by [illegible] which [illegible] says, however, "I did [illegible] tends to show that the husband [illegible]

alleged conversation, but he was not called as a witness. Plaintiff in rebuttal denied that he had asked these people to "come out and look at Florence's new car."

The rules of law as to the facts necessary to establish a gift inter vivos are well settled in this state and are set forth in the leading cases of Barnum v. Reed, 136 Ill. 388; Telford v. Patton, 144 Ill. 611, and the cases which follow those decisions.

In order to establish such gift, it is necessary to prove (1) that there was an intention on the part of the donor to transfer and vest the title and right of possession of the property in the donee; (2) that there was a delivery of the subject matter of the gift, and (3) that the owner parted with all control over the subject matter and divested himself of all dominion over it. These cases also hold that the burden of proof is upon the party claiming the gift to establish it by a clear preponderance of the evidence.

It is unnecessary to review at length the numerous cases that have been cited. For obvious reasons less evidence would be required to establish a gift from husband or wife, who are living together, from one to the other, than would be necessary to establish a gift to a stranger. At the time of this alleged gift, these parties were living together but a few months thereafter separated. Whether the causes which brought about the separation arose suddenly does not appear.

The undisputed facts, however, that plaintiff bought and paid for the automobile with his own money; that the licenses were taken in his own name and paid for by him, and that the insurance on the automobile was carried in his name, seem to negative any intention on his part to make a gift or to transfer title to his wife. Giving full credence to the testimony for defendant as to the April fool gift, etc., we think the remarks testified to by

alleged conversation, but he was not called as a witness. [illegible] in rebuttal denied that [illegible] ever made the statement and took at [illegible]'s low cost."

The rules of law as to the [illegible] of a gift inter vivos are well settled in this state and are set forth in the leading cases of [illegible] v. Kent, [illegible] 388; [illegible] v. Potter, 144 ill. 521, and the cases which follow those decisions.

In order to establish such [illegible] it is necessary to prove (1) that there was an intention on [illegible] to transfer and vest the title and [illegible] of the property in the donee; (2) [illegible] delivery of the subject matter of the gift, and (3) [illegible] owner [illegible] all control over the subject matter and divested himself [illegible] of all ownership [illegible] it. These cases also hold [illegible] burden [illegible] clearly claiming the gift to establish it by a clear and [illegible] of the evidence.

It is unnecessary to review at [illegible] numerous cases [illegible] this [illegible]. [illegible] would be required to establish [illegible] or gift, [illegible] together, [illegible] and [illegible] [illegible] to establish a gift to a stranger, [illegible] of [illegible], [illegible] parties were living [illegible] [illegible]. Whether [illegible] does not appear.

[illegible] had paid for [illegible] were taken in his own name [illegible] on the mortgage for money [illegible] interest on his [illegible] or to [illegible] his wife. Taking [illegible] so to the April 1st 1917, etc., [illegible]

her are not inconsistent with plaintiff's evident intention to keep the title to the car in himself.

The finding and judgment are manifestly against the weight of the evidence, and the judgment is therefore reversed with a finding of facts and judgment here for plaintiff.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE FOR PLAINTIFF.

McSurely, P. J., and O'Connor, J., concur.

Nor are not inconsistent with plaintiff's evident intention to keep the title to the car in himself.

The finding and judgment are manifestly against the weight of the evidence, and the judgment is therefore reversed with a finding of facts and judgment here for plaintiff.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE FOR PLAINTIFF.

Sedgwick, J., J., and O'Connor, J., concur.

FINDING OF FACTS.

We find as facts that on March 31, 1928, plaintiff, Richard W. Gilliam, purchased and paid for the Chevrolet automobile which was replevied in this cause; that the same was delivered to him; that he thereafter procured and carried liability insurance in his name upon said automobile in the Continental Casualty Company and procured and carried licenses in his name from the Village of Maywood, in which he resided, and also from the Secretary of State of the State of Illinois; that he at no time made any gift inter vivos of said car to defendant, Florence F. Gilliam; that the evidence submitted in behalf of defendant is wholly insufficient to establish such gift; that the right of property and of possession to said automobile is in plaintiff, and that judgment upon this finding should be entered in this court and for one cent damages for the detention of said property.

We find as facts that on March 31, 1929, plaintiff, Richard V. Ogilvie, purchased and paid for the Chevrolet automobile which was replevied in this cause; that the same was delivered to him; that he thereafter procured and carried liability insurance in his name upon said automobile in the Continental Casualty Company and procured and carried licenses in his name from the Village of Maywood, in which he resides, and also from the secretary of State of the State of Illinois; that he at no time made any gift inter vivos of said car to defendant, Florence A. Ogilvie; that the evidence submitted in behalf of defendant is wholly insufficient to establish such gift; that the issue of property and of possession to said automobile is in plaintiff, and that judgment upon this finding should be entered in this court and for the cost incurred for the detention of said property.

33694

JOHN MALLINGER,
Appellee,

vs.

CARL H. BERGGREN and
ANNA BERGGREN,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a decree entered in favor of complainant for the sum of $4,025, with interest from August 18, 1927, in a proceeding to foreclose a mechanic's lien.

The cause was heard by the chancellor upon exceptions of defendants to the report of a master. The exceptions were overruled and the decree entered as stated.

The claim of complainant was based upon an alleged oral contract said to have been made between complainant and defendants on January 3, 1927, whereby complainant was to furnish plans and specifications and to superintend the construction of an improvement for five per cent of such estimated cost, less $700 incurred by defendants for plans with other architects.

The defense averred was that no contract such as alleged in the bill was made, but, on the contrary, that complainant solicited the employment, stating that he would make plans more satisfactory than those for which defendants were already obligated to pay, and agreed that no charge would be made unless the proposed building was actually constructed; that defendants abandoned the project of building upon the premises and afterwards sold the same.

As already stated, the master found the issues of fact and law in favor of complainant, and the chancellor has approved of the finding of the master.

Defendants contend that the decree should be reversed, first, because as a matter of law no lien is given by the statute

where the services of an architect are not actually used in the construction of an improvement on premises, and, secondly, because it is argued on the issues of fact that the decree is contrary to the manifest weight of the evidence.

In weighing the evidence it may be well in the first place to state some of the uncontradicted facts.

Complainant has for many years been a duly licensed architect, and at the time of the occurrences here in question maintained offices at No. 3323 North Clark street, Chicago. Defendants, who are husband and wife, at the time of the transaction in question owned in joint tenancy lots 1 and 2, a corner at Granville avenue and Lincoln street, Chicago. Lots 1 and 2 have since been sold, and defendants still own lots 3 and 4, which were purchased while the transaction in question was pending. Lots 1 and 2 were encumbered by a mortgage of $12,000. Defendants had in mind the erection of an apartment building of 36 flats on these four lots; they had obtained a sketch or plan for a building of this kind from the Prudential Realty Company, for which they were obligated to pay $700 if used and $400 if not used.

Defendants' financial circumstances were such that in order to build it was necessary to obtain a loan, whic had not been done when Mr. Berggren first met complainant on January 3, 1927. The Berggrens lived in Oak Park and Mr. Berggren was the superintendent of the Gulbransen Piano company.

There is a sharp conflict in the evidence as to the manner in which complainant and defendant Carl Berggren came into contact. Complainant says he learned of defendants' intention to build through a source which he does not recall, but at any rate the parties agree that on January 3, 1927, complainant went to defendants' place of business, presented his card and solicited employment as an architect in connection with the proposed building.

where the services of an architect are not actually used in the construction of an improvement on premises, and, secondly, because it is argued on the issues of fact that the Jurors is contrary to the manifest weight of the evidence.

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Defendants' financial circumstances were such that in order to build it was necessary to obtain a loan, which had not been done when Mr. Bergquist first met complainant on January 1, 1927. The Bergquists lived in Oak Park and Mr. Bergquist was the superintendent of the Hawthorne Glass Company.

There is a sharp conflict in the evidence as to the manner in which complainant and defendant first became brought into contact. Complainant says he learned of defendants' intention to build through a source which he does not recall, but at any rate the parties agree that on January 4, 1927, complainant came to defendants' place of business, presented his card and solicited employment as an architect in connection with the proposed building.

John N. Hanson, a heating contractor, who is on friendly terms with defendant and who since the time of these transactions has become unfriendly with complainant, says that he informed complainant of defendant's intention to build, suggested that he try for the job, and called Mr. Berggren on the 'phone from complainant's place of business; that complainant and defendant then talked together on the 'phone and complainant said that he would come out to see Mr. Berggren in a few days. Hanson says this was about the middle of December.

Mr. Berggren says that he talked on the 'phone with complainant and told him to come and see him after the holidays; that on January 3rd complainant came to his office pursuant to that conversation.

Complainant testifies that Hanson did not call Berggren from his office; that Hanson did not give him Berggren's address but that "the other party did. I don't remember the other party's name."

The evidence is also conflicting on the question of whether Mr. Berggren on January 3, 1927, informed complainant of the plans which had been obtained from the Prudential Realty Company. Complainant says he did not hear of these plans until about the first of May and that he first saw them about that time at his office where he checked them up with his own plans. He says that Mr. Berggren then for the first time said that the Realty Company wanted $700 for these plans and that he, complainant, then for the first time, promised to allow that amount to defendant at the time of final settlement.

Mr. Berggren, on the other hand, says that on January 3rd he told complainant that he had these plans, showed him the sketches and told complainant that these would have to be paid for; that complainant then said he didn't think the plans amounted to much, that he could put up a cheaper building, one easier to get a

John A. Hanson, a meeting of [illegible], was in an friendly terms with defendant and who since the time of these occurrences has become unfriendly with complainant, made [illegible] complaint of defendant's intention to [illegible] for the job, and called Mr. Hargrave on the 'phone [illegible] place of business; that conversation and telephone [illegible] gather on the 'phone and complainant said that he would come out to see Mr. Hargrave in a few days. Hanson says this was about the middle of December.

Mr. Hargrave says that [illegible] complainant and told him on some occasion after the meeting; that on January 3rd complainant came to his office between 10 that conversation.

Complainant testifies that Hanson did not call on him [illegible] from his office; that Hanson did not give him Hargrave's telephone but that "the other party did." [illegible] party's name."

The evidence is [illegible] whether Mr. Hargrave [illegible] the place where [illegible] Complainant says he did not know [illegible] First of May and that he [illegible] Mr. Hargrave [illegible] wanted $700 for [illegible] first time, promised to [illegible] of final settlement.

Mr. Hargrave [illegible] and he said complainant [illegible] objective and held [illegible] that complainant then said he [illegible]

loan on and that on account of complainant's friendship for Hanson he would make a special proposition, that he, complainant, would draw the plans, supervise the building, let the bids and help him to get the mortgage, for a consideration of three per cent, and that if defendant should decide not to use complainant's plans he would not charge him at all. Mr. Berggren further says that complainant also stated that he did not think it would be difficult to get a loan of $140,000 and that he thought the building could be put up for $100,000 to $125,000.

Hanson testifies that at a later time in January he talked to complainant about the matter, telling him of the proposed terms as related by Mr. Berggren, and that complainant said he "would take a chance."

Complainant says nothing was said about the cost of the proposed building; that defendant said nothing about other plans. He says:

> "I told him the charges were five per cent pro rated on the Illinois Society of Architects' schedule, 'and that includes plans, supervising,' I says, 'possibly.' I told him we have to make those sketches over two or three times, and we take care of the building, supervising. Well, he thought that was all right -- a man is entitled to his service; so he stated what his intention was to do; to put up a building there, and get as many apartments on the ground as possible. He said that time the ground was 110 by 145 feet deep. That was the southwest corner of Granville and Lincoln."

Complainant says that he did not have a schedule there of the charges of the Illinois Architects' Society and is positive that no sketches were shown to him. He says that he did not ask defendant for any money on account when he started; that when the preliminaries were completed about the middle of April he was entitled to one-tenth of his fees, but that he did not ask defendant for it and that nothing was said about it; that in the fore part of March Mr. Berggren called him and told him to go ahead and complete the plans, to get as much bay window as he could and to make the rooms as large as possible. Mr. Berggren testifies that he had

no such conversation with complainant.

On August 18, 1927, complainant says he was entitled to seven-tenths of his fees but that he had not said anything to Mr. Berggren about money up to that time and did not send him a bill. In the meantime Mr. Berggren had unsuccessfully tried to get a loan of $140,000. In the first part of September or the latter part of August complainant learned that defendant would not build in 1927. In October he called up Mr. Berggren who then said he would not do anything about building until spring and complainant did not talk with him afterwards. In September, 1927, complainant filed his claim for a mechanic's lien against the premises but made no demand for the payment of any money until January 17, 1928, at which time he wrote stating that he would appreciate some money on account, but not stating that any definite amount was due or requesting any specific sum.

The weight to be given to a finding of fact by a master which has been approved by a chancellor has been the subject of somewhat conflicting decisions. It seems, however, to have been settled in Chechik v. Koletsky, 311 Ill. 433, that the finding of a master is not to be given the same effect as the verdict of a jury in a case where the parties have the right to have the issues of fact determined by a jury, and it is stated:

> "In a chancery case the facts are found by the court, and the master's report, while prima facie correct, is of an advisory nature, only. All the facts are open for the consideration, in the first instance, of the trial court, and in case of an appeal, by the reviewing court. Without regard to the finding of the master upon any particular question of fact, the ultimate and final question in this court is: Was the decree rendered by the chancellor the proper one under the law and the evidence? Corbly v. Corbly, 280 Ill. 278; Kelly v. Fahrney, 242 id. 240; Fairbury Agricultural Board v. Holly, 169 Id. 9."

In this case the master stated in his report that from his observation of the witnesses on the stand he disbelieved Berggren and Hanson and believed complainant. One reason given is that Hanson and Berggren were close friends socially. The

no more conversation with complainant.

On August 19, 1927, complainant says he was notified to move-inside of his room but that he had not said anything to Mr. Patterson about money up to that time and did not send him a bill. In the meantime Mr. Patterson had unnecessarily cried to get a loan of $100.00. In the first part of November or the latter part of August complainant learned that defendant would not build in 1927. In October he called up Mr. Patterson who then said he would not do anything about building until spring and complainant did not talk with him afterwards. In September, 1927, complainant filed his claim for a mechanic's lien against the premises but made no demand for the payment of any money until January 17, 1928, at which time he wrote saying that he would appreciate some money on account, not stating that any definite amount was due or requesting any specific sum.

The subject to be taken as a finding of fact by a master which has been approved by a commissioner has been the subject of numerous most lasting decisions. It seems, however, to have been settled in Wendell v. Holyoke, 211 Ill. 412, that the finding of a master is not to be given the same effect as the verdict of a jury in a case where the parties have the right to have the issues of fact determined by a jury, and it is stated:

> "In a chancery case the facts are tried by the court, and the master's report, while prima facie correct, is not an advisory report, only. All the facts are open for the consideration, in the first instance, of the trial court, and in case of an appeal, by the tribunal which, without the report of the master upon any material question of fact, the ultimate and final court of review must decide for itself. The master's report is to be given the proper use under the law as the evidence." Cooley v. Cooley, 76 Ill. 70; Kelly v. Kelly, 148 Ill. 384; Chicago Municipal Gas Co. v. Hall, 147 Ill. 7."

In this case the master stated in his report that from his observation of the witnesses he had found the witnesses for Lawson and different conclusions. The trial court in that opinion and decision gave this as a reason for

evidence shows that on a few occasions they had played golf together but fails to establish that they were close friends. A more important matter is the admission by Hanson of the truth of Mallinger's testimony to the effect that when in September he, Mallinger, spoke to Hanson about filing a claim for lien against defendants, Hanson suggested that he ought to take measures to protect himself. At the same time this frank admission by Hanson would indicate that he was not intentionally swearing falsely in favor of Berggren. He explains that he "was just an innocent bystander."

Complainant and defendant are of course equally interested in the result of the suit, and the burden of proof was upon complainant to establish his case by a preponderance of the evidence.

Practically every material fact to which complainant testified is denied in detail by Berggren, who is corroborated by Hanson. Of course, the preponderance of the evidence is not alone to be determined by the number of witnesses who testified to or against a given fact, but in weighing conflicting evidence not only the number of witnesses but the probabilities of the respective narrations of the witnesses becomes persuasive. The testimony of Berggren and Hanson as to the manner in which contact with complainant was made seems more probable than the indefinite evidence on that point given by Mallinger, who was unable to remember how he first learned that Berggren, who was a stranger to him, contemplated putting up a building.

It is difficult to understand just why Mr. Berggren should have concealed from complainant the fact that he was already obligated to pay for other plans. There is no doubt that complainant solicited the business and in doing so he would naturally offer some inducements to his prospective customer. Again, it Hardly

evidence where then on a few occasions [illegible] [illegible] gather not little to establish that they were alone [illegible]. A more important matter is the admission by Hanson of the [illegible] Mallinger's testimony to the effect that when in [illegible], Mallinger, wants to lessen about filing a [illegible] [illegible] determinate, Hanson suggested that [illegible] to take measures to protect himself. [illegible] would indicate that on the [illegible] [illegible] [illegible] favor of Burgess. [illegible] reasonable."

Conclusions and testimony are of course equally [illegible] interested in the result of the [illegible], and the [illegible] upon complainant to establish his case by a preponderance of the evidence.

Practically every material fact in issue is established in dispute in [illegible] by Burgess, and is [illegible] by Hanson. Of course, the preponderance of the evidence is not alone to be determined by the number of witnesses who testify on or against a given fact, but [illegible] only the number of witnesses [illegible] the comparative motivations of the witnesses [illegible]. [illegible] of Burgess and Hanson [illegible] complainant has [illegible] [illegible] [illegible] how he first learned that [illegible], and [illegible] contemplated getting [illegible].

It is difficult to [illegible] should have [illegible] obligated to pay for [illegible] not solicited the [illegible] some independence to the [illegible] [illegible] [illegible]

seems reasonable to suppose that Berggren would, in addition to plans for which he was already obligated, bind himself to the additional payment of $4,000 to $5,000 before he had secured the loan which was a necessary preliminary if the building was to be erected, nor does it seem reasonable to suppose that complainant would have waited from January 3, 1927, to January 17, 1928, before asking for any payment on account and then fail to indicate that any particular sum was due if an unconditioned obligation was incurred by defendant.

On some matters of fact it appears the master clearly erred, as where he found the title to all four of the lots to have been in defendants at the time the contract was made, whereas defendants owned only two of the lots at that time. In computing the amount found due it seems the master accepted $135,000 as the cost of the proposed building. Complainant's testimony was that this was the total amount of bids received by him, but he also stated that the estimated value of the proposed structure in June, 1927, was $125,000. Assuming a liability it would seem that the computation should have been based on that sum rather than on the total amount of the bids. The report found the sum of $4,725 less an allowance of $400, namely, $4,325, to be due, although complainant himself testified that the reasonable value of his services was $4,000.

In view of the fact that the testimony of complainant, upon facts in controversy, is denied by two witnesses and that the facts as related by him are quite improbable in view of the uncontradicted facts and circumstances, it would seem that a court of review must be constrained as to the facts to hold the finding of the master against the weight of the evidence.

This court is already committed upon the question of law in a case where the complainant here was also the complainant,

seems reasonable to suppose that Metzgerson would, in addition to plans for which he was already obligated, plan on all to use additional payments of $4,000 to $5,000 before he had secured the loan which was a necessary preliminary if the building was to be erected, nor does it seem reasonable to assume that Metzgerson would have waited from January 3, 1927, to January 17, 1928, before making for any payment on account and then, just in anticipation that any new income was due if an unconditional obligation was incurred by defendant.

In some matters of fact it appears the matter is very strong, as there be found the claim to all some of the facts in have been in dispute at the time the contract was made, because defendants owned only two of the lots at that time. In computing the amount found due it seems to matter accepted [illegible] as the cost of the proposed building. Commissioner's testimony was that this was the total a sum of like received by him, but he also stated that the estimated [illegible] of the proposed structure in June, 1927, was [illegible]. Assuming a liability it would seem that the compensation should have been based on that, not rather than on the total amount of the bids. The report found the sum of $4,[illegible] less an allowance of [illegible], namely, $4,[illegible], to be due [illegible] commissioner himself established that the reasonable value of his services was $4,[illegible].

In view of the fact that [illegible] or [illegible], upon facts in controversy, is [illegible] by the [illegible] and [illegible] leave to be [illegible] by him are quite [illegible] in view of the accomplished facts and circumstances, it [illegible] that [illegible] a [illegible] review must be [illegible] in the [illegible] of the [illegible], or the master against the judgment of the [illegible].

This court is [illegible] [illegible] in a case where the [illegible] [illegible] and the [illegible],

and where the facts were quite similar. In Mallinger v. Shapiro, 244 Ill. App. 228, we held, construing section 1 of the Mechanic's Lien act, an architect was not entitled to a lien under an oral contract for services in drawing plans for a building which was never in fact constructed. It is now urged upon us that the opinion in that case misconstrues section 1 of the Lien act. The case, however, was reviewed in Mallinger v. Shapiro, 329 Ill. 629, and affirmed, although the court in its opinion held that a decision as to the question of law was not necessary and declined to pass upon it.

Complainant cites Standard Oil Co. v. Vanderboom, 326 Ill. 418, and Carnegie v. Tate, 245 Ill. App. 617, in addition to authorities which were cited and considered in our opinion filed in that case. We have examined these additional authorities and find nothing therein which we regard as inconsistent with the law as stated in that opinion. On the contrary, in Standard Oil Co. v. Vanderboom, there are expressions which we interpret as approving of the views expressed in Mallinger v. Shapiro.

In the absence of authority by our Supreme Court holding to the contrary, we adhere to that decision, and in conformity therewith the decree in this case will be reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

and where the facts were quite similar. In _Williams v. Jenkins_, 244 Ill. App. 328, we held, construing Section 1 of the Contractors Lien Act, an architect was not entitled to a lien where an oral contract for services in drawing plans for a building which was never in fact constructed. It is now urged upon us that the opinion in that case misconstrues section 1 of the lien act. The case, however, was reviewed in _Williams v. Jenkins_, 349 Ill. 439, and affirmed, although the court in its opinion held that a decision as to the question of lien was not necessary to dispose of the case and to upon it.

Complainant cites _Kimbrough et al. v. Kimbrough_, 339 Ill. 424, or _Cornelia v. Fritz_, 248 Ill. App. 527, in addition to authorities which were cited and considered in our opinion filed in that case. We have considered these additional authorities and find nothing therein which is regarded as inconsistent with the law as stated in that opinion. In the authority, as _Long Lumber Co. v. Vandercoom_, there are circumstances which are interpreted as supporting of the views expressed in _Williams v. Jenkins_.

In the opinion, as modified by our decision herein, we adhere to that decision, and it is unnecessary therewith the decree in this case will be affirmed. The cause remanded with directions to dismiss the bill.

DECREE AFFIRMED.

McSurely, J., and O'Connor, J., concur.

33764

STANISLAW LAKOMY,
Appellee,

vs.

FRANK ROZAK and JOSEPHINE ROZAK,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 28, 1928, plaintiff Lakomy caused a judgment by confession for the sum of $1070 to be entered against defendants upon their promissory note.

On July 27th thereafter on motion by defendants supported by their affidavit an order was entered that the judgment be opened, that leave be given defendants to defend, that a trial be had and that the judgment stand as security. Later there was a trial and the court found that on the date judgment was confessed defendants were indebted on the note in the sum of $1,070. Judgment was entered that the former judgment of June 28th stand confirmed. This judgment defendants seek to reverse on this appeal.

The defense set up in the affidavit of merits was stated to be:

> "** the said note sued upon herein is a conditional one, contingent upon certain conditions and predicated upon a certain real estate exchange contract, entered into by and between the plaintiff and the defendants, a copy of which is attached hereto, and by reference made a part hereof;"

further that at the time of the execution of the contract the note in question was placed in escrow with one Obrzut for purposes set forth in the contract; that after the execution of the contract defendants discovered that the sewer and plumbing system of the real estate contracted for was connected with the sewer system of the rear building of the adjoining lot, which adjoining lot was not owned by plaintiff, and that upon discovery of that fact one of defendants talked with plaintiff about the matter and plaintiff promised upon that and other occasions that he would not hold

33764

BERNITSKAY LAMONY,
Appellee,

vs.

MARK MONAE and JOHN-DIXN MONAE,
Appellants.

APPEAL FROM SUPERIOR COURT
OF CHICAGO.

MR. JUSTICE MCCURDY DELIVERED THE OPINION OF THE COURT.

On June 22, 1921, plaintiff Lamony obtained a judgment by confession for the sum of $1000 to be entered against defendants upon their promissory note.

On July 12th thereafter on motion by defendants supported by their affidavit a rule was entered that the judgment be opened, that leave be given defendants to defend, that a trial be had and that the judgment stand as security. Later there was a trial and the court found that on the 1st day of January was defendants were indebted on the note in the sum of $1,000. Judgment was entered that the former judgment be [illegible] such equal conditions. This judgment defendants seek to review on this appeal.

The issues set up in the affidavit of defense are stated to be:

"If the said note [illegible] Lamony is a [illegible] contingent upon certain certain conditions and [illegible] [illegible] real estate exchange contract, entered into by and between the plaintiff and the defendants, a copy of which is attached hereto, and by reference made a part hereof;

Further that at the time [illegible] in question was given in consideration [illegible] for the construction [illegible] defendants [illegible] real estate contracted for [illegible] the real building at [illegible] not caused by plaintiff, [illegible] of defendants taken with [illegible] [illegible] plaintiff upon land and other [illegible]

defendants to the contract; that Obrzut delivered the note to plaintiff without defendants' consent.

The parties upon the trial offered evidence tending to sustain their respective contentions, and at the close of the evidence defendants submitted propositions of law to the effect that plaintiff was not entitled to recover because he was not the legal holder of the note; that the alleged note was conditioned upon the performance on the part of plaintiff of the terms and conditions of a real estate exchange contract executed at the same time as the note; that the execution of this contract and note in question constituted one transaction; that before plaintiff could recover it was necessary that he show by a preponderance of the evidence that he had fulfilled the terms and conditions contained in the real estate exchange contract and that defendants had defaulted therein; that it was necessary, before plaintiff could recover, that he should prove that he had tendered a statutory warranty deed in accordance with the terms and conditions laid down in the contract in evidence, and that defendants refused to accept the deed and further refused to deliver the statutory warranty deed with reference to their property and in accordance with the terms and conditions of the contract; that as a matter of law there was never any delivery of the note in question by defendants to plaintiff; that the sewer and plumbing system contained in the premises mentioned in the contract connected with a building on the south, which building and premises were owned by another party; that this was a material and latent defect which could not be ascertained at the time of the execution of the contract in question and therefore constituted a material breach of the contract, whereby defendants had a right to rescind the same.

All of these propositions were refused and a finding entered as hereinbefore set forth.

defendants to the contract; that Grant delivered the deed to plaintiff without defendants' consent.

The parties upon the trial offered evidence tending to sustain their respective contentions, and at the close of the evidence defendants submitted propositions of law to the effect that plaintiff was not entitled to recover because he had not the legal holder of the note; that the alleged note was conditioned upon the performance on the part of plaintiff of the terms and conditions of a real estate exchange contract executed at the same time as the note; that the execution of this contract and note in question constituted one transaction; that before plaintiff could recover it was necessary that he show by a preponderance of the evidence that he had fulfilled the terms and conditions contained in the real estate exchange contract and that defendants had defaulted therein; that it was necessary, before plaintiff could recover, that he should prove that he had tendered a satisfactory warranty deed in conformance with the terms and conditions held forth in the contract in evidence, and that defendants refused to accept the deed and further refused to deliver the warranty deed which reference to their property and in accordance with the terms and conditions of the contract; that as a matter of law there was never any delivery of the note in question by defendants to plaintiff; that the water and plumbing system contained in the premises mentioned in the contract through connected with a building on the same, [illegible] and premises were owned by another party; that this was a material and latent defect which could not be ascertained at the time of the execution of the contract in question and therefore constituted a material breach of the contract, thereby [illegible] a right to rescind the same.

All of these propositions were refused and on a trial upon defaulted on herein before set forth.

It is not urged in behalf of defendants that the finding of the court is against the evidence upon any material fact, and there can, we think, be no dispute as to the actual facts established by the evidence.

Plaintiff and defendants on April 4, 1928, entered into a contract whereby they agreed to exchange certain parcels of real estate owned by them respectively. The contract contained the usual provisions as to title, encumbrances, prorating of taxes, etc. No cash was paid by either party, but each of the parties executed a note to the order of the other for $1,000. The contract states: "Both parties have executed judgment notes for $1,000, payable to themselves in case of default for expenses." The contract provided that commission should be paid to Walter L. Obrzut and that the deed should be passed and negotiations closed at his office within five days after the deal was found good. Time was made the essence of the contract, and it was provided that the contract should be held by Obrzut for the mutual benefit of the parties.

Mr. Rozak testifies that when he discovered the condition of the sewage and plumbing system he told plaintiff thereof and that plaintiff said to him that he would not enforce the contract against his wishes. Plaintiff denies that Mr. Rozak ever spoke to him about the sewer, and he together with Obrzut and Leleko, who worked in Obrzut's office, testified that both defendants said that they were not going through with the deal but that nothing was said by either of them about the sewer. Obrzut says that Rozak offered to pay him a certain amount if he would break the deal.

Evidence was also given in behalf of the plaintiff by Mr. Pinciak, a plumber, who testified that a former connection of the sewer of plaintiff's premises with the adjoining lot had in fact been disconnected.

If the trial court believed the evidence introduced by plaintiff, it is apparent that the propositions of law submitted were

It is argued in behalf of defendants that the finding of the court is against the evidence upon any material fact, and there can, we think, be no dispute as to the ultimate facts established by the evidence.

Plaintiff and defendants on April 4, 1899, entered into a contract whereby they agreed to exchange certain portions of real estate owned by them respectively. The contract contained the usual provisions as to title, encumbrances, abstracting, etc., etc. In each was paid by either party, but each of the parties executed a note to the order of the other for $1,000. The contract stated: "Both parties have deposited payment notes for $1,000, payable to themselves in case of default for exchange." The contract provided that conveyances should be made on either side. Notice was sent the land should be passed and deed exchanged at the office within five days after the deal was found good. Time was made the essence of the contract, and it was provided that the contract should be held by Ebrand for the mutual benefit of the parties.

A, Horace Hartition was then an employee and con-
tion of the sewage and plumbing system in a hotel in Chicago and that plaintiff said to him that he would not [illegible] the contract against his wishes. Plaintiff denies that [illegible] over [illegible] his whole life secret, and he testified [illegible] worked in Ebrand's office, [illegible] they were not acting [illegible] by either of them [illegible] to pay him a certain amount [illegible] deal.

Evidence was also given in behalf of [illegible] Mr. Finnie, a witness, was [illegible] connection with the sewer of plaintiff's premises [illegible] been disconnected.

If the trial court believed the evidence introduced by plaintiff, it is asserted that [illegible] of the [illegible]

not applicable to the facts of the case, and if the trial court found the facts according to this evidence as submitted in behalf of plaintiff, we cannot say that the finding is against the weight of the evidence. Propositions of law, therefore, urged in defendants' brief as to the necessity of a vendor furnishing an abstract of title and to the effect that the vendee could not be placed in default until an abstract was furnished, would not be applicable to a case where the vendee without just cause repudiated his obligations under the contract. The law would not require a needless formality. Lyman v. Gedney, 114 Ill. 388; Osgood v. Skinner, 211 Ill. 229. This is a complete answer to the argument of defendants that there is no evidence tending to show that plaintiff complied with the conditions and terms of the contract.

It is also urged that there was no delivery of the note, but the question of the delivery of a note, as in the delivery of a deed, is a question of what the intention of the parties was, and in view of the fact that no money was paid by either party at the time of the execution of the contract, and considering the language used in the contract with reference to the notes, we think an intention to deliver the same may be inferred from the evidence. Main v. Pratt, 276 Ill. 218; Struve v. Tatge, 285 Ill. 103.

It is also urged in behalf of defendants that the note was in the nature of a forfeit or penalty for failure to comply with the contract and that the amount of recovery should therefore have been limited to damages actually sustained and proved, if any.

There was evidence tending to show that the usual and customary rate for commissions to a broker of three per cent would amount to $900; on that item alone damages could not be less than $900. Assuming that the note is in the nature of a penalty, we do not think the amount of the judgment can be considered excessive under the circumstances. Gobble v. Linder, 76 Ill. 157; Burk v.

not applicable to the facts of the case, and if the trial court found the facts according to this evidence as submitted in behalf of plaintiff, we cannot say that the finding is against the weight of the evidence. Propositions of law, therefore, urged in defendants' brief as to the necessity of a vendor furnishing an abstract of title and to the effect that the vendee could not be placed in default until an abstract was furnished, would not be applicable to a case where the vendee without just cause repudiated his obligations under the contract. The law would not require a needless formality. Lyman v. Gedney, 114 Ill. 389; Conrad v. Skinner, 211 Ill. 298. This is a complete answer to the argument of defendants that there is no evidence tending to show that plaintiff complied with the conditions and terms of the contract.

It is also urged that there was no delivery of the note, but the question of the delivery of a note, as in the delivery of a deed, is a question of what the intention of the parties was, and in view of the fact that no money was paid by either party at the time of the execution of the contract, and considering the language used in the contract with reference to the notes, we think an intention to deliver the note may be inferred from the evidence. Kain v. Fisk, 276 Ill. 216; Pierce v. Yates, 258 Ill. 102.

It is also urged in behalf of defendants that the note was in the nature of a forfeit or penalty for failure to comply with the contract and that the amount of recovery should therefore have been limited to damages actually sustained and proved, if any.

There was evidence tending to show that the usual and customary rate for commissions to a broker of three p r cent would amount to $900; on that item alone damages could not be less than $900. Assuming that the note is in the nature of a penalty, we do not think the amount of the judgment can be considered excessive under the circumstances. Gobble v. Linder, 78 Ill. 157; Burk v.

Dunn, 55 Ill. App. 25; Gibb v. Merrill, 234 Ill. App. 267.

We think the evidence clearly shows that defendants defaulted in the performance of their contract without any cause whatsoever, and that the judgment against them for the amount of the note is just. The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

Quer, 56 III. App. 18; Gibb v. Merrill, 256 Ill. App. 207.

We think the evidence clearly shows that defendants defaulted in the performance of their contract without any excuse whatsoever, and that the judgment against them for the amount of the note is just. The judgment is therefore affirmed.

AFFIRMED.

Mosmeely, P. J., and O'Connor, J., concur.

33777

ARTHUR J. THOMAS,
Appellant,

vs.

DAVID MORGANS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On April 24, 1929, plaintiff, Arthur J. Thomas, confessed judgment against defendant, David Morgans, on a promissory note. Upon motion of defendant, supported by his verified petition, the judgment was opened and defendant had leave to defend. Thereafter, upon trial by the court, there was a finding for defendant and judgment thereon, which plaintiff asks us to reverse.

The note in question is to the order of Jason A. Thomas, a brother of plaintiff, by whom it was endorsed. The defense interposed is that the consideration for the note was real estate commissions claimed to have been earned by Jason A. Thomas on account of the sale of thirty lots in the city of Chicago owned by Morgans to one George Sawiak; that at the time of the sale Jason A. Thomas orally agreed with defendant Morgans that no commission would be due until the respective pieces of real estate should have been paid for by the purchaser; that Jason Thomas agreed not to negotiate the note but to hold it as guaranty of the payment of commissions when the same should become due; that said note should not go into effect as a note until the purchaser had fully paid the purchase money, and that when said money was fully paid the said note should take effect as a delivered instrument.

The affidavit of merits further alleged that at the time Jason A. Thomas obtained possession of the note sued on, another note in the sum of $550 was given by defendant upon the same terms and conditions.

It was also averred that four of the lots had been paid

[illegible]

ARTHUR J. THOMAS,
Appellant,

vs.

DAVID MORGANS,
Appellee.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

On April 24, 1899, plaintiff, Arthur J. Thomas, confessed judgment against defendant, David Morgans, on a promissory note. Upon motion of defendant, supported by his verified petition, the judgment was opened and defendant was leave to defend. Thereafter, upon trial by the court, there was a finding for defendant and judgment thereon, which [illegible] reversed.

The note in question is in the order of [illegible] Thomas, a brother of plaintiff, to whom it was delivered. The defense interposed in [illegible] was that the note was [illegible] subsequently alleged to have been [illegible] by Arthur A. Thomas on account of the [illegible] in the [illegible] by returning to one [illegible] the note in suit. Arthur A. Thomas would be the only [illegible] who [illegible] been paid for by the [illegible] note. [illegible] not to negotiate the note but [illegible] misdeeds when the [illegible] not be into effect [illegible] note until [illegible] note should [illegible].

The [illegible] time [illegible] Thomas [illegible] note in the sum of $850 [illegible] and conditions.

It was [illegible]

for and that defendant had paid the commission on these lots in the sum of $300 which was applied on the note for $550 in accordance with his agreement; that no other of the lots had been fully paid for and there was therefore no other sum due as commission on said note.

Defendant further averred that plaintiff took the note with full knowledge of the agreement between defendant and Jason A. Thomas; that plaintiff was not a holder of the note in due course; that he paid no consideration therefor and simply held the same for the benefit of the payee; that at the time he procured the purchaser for the real estate, Jason A. Thomas held no license as a real estate broker or salesman and for that reason could not recover.

Defendant upon trial assumed the burden of establishing his defense and called plaintiff as a witness under section 33 of the Municipal Court act, and the parties offered other evidence tending to sustain their respective contentions.

Plaintiff urges that he is a holder in due course. The evidence shows without contradiction that the note was transferred by Jason A. Thomas before maturity, but a consideration of all the evidence leaves us unconvinced that plaintiff took the same in good faith and for a valuable consideration. Plaintiff is the brother of Jason A. Thomas, and the alleged consideration for the note was money advanced by plaintiff to their parents. It does not appear that the parents needed such assistance, and we have some doubt as to whether it was ever in fact given. The finding of the court is entitled to the same weight as the verdict of a jury, and we do not think we can say that the finding of the court on this issue is against the manifest weight of the evidence.

Jason A. Thomas was not a licensed broker, and on the authority of Hendricks v. Richardson, 233 Ill. App. 130, defendant contends he cannot recover. However, it is uncontradicted that

for and that defendant had paid the commission on these lots in the sum of $300 which was applied on the note for $850 in accordance with his agreement; that no other of the lots had been fully paid for and there was therefore no other sum due as commission on said note.

Defendant further avered that plaintiff took the note with full knowledge of the agreement between defendant and Jason A. Thomas; that plaintiff was not a holder of the note in due course; that he paid no consideration therefor and simply held the same for the benefit of the payee; that at the time he presented the purchaser for the real estate, Jason A. Thomas held no license as a real estate broker or salesman and for that reason could not recover.

Defendant upon trial examined the burden of establishing his defense and called plaintiff as a witness under section 55 of the Municipal Court act, and the parties offered other evidence tending to sustain their respective contentions.

Plaintiff urges that he is a holder in due course. The evidence shows without contradiction that the note was transferred by Jason A. Thomas before maturity, but a consideration of all the evidence leaves us unconvinced that plaintiff took the same in good faith and for a valuable consideration. Plaintiff is the brother of Jason A. Thomas, and the alleged consideration for the note was money advanced by plaintiff to their partners. It does not appear that the partners needed such assistance, and we have some doubt as to whether it was ever in fact given. The finding of the court is entitled to the same weight as the verdict of a jury, and we do not think we can say that the finding of the court on this issue in examiner the manifest weight of the evidence.

Jason A. Thomas was not a licensed broker, and on the authority of Hourigan v. Kingsley, 245 Ill. App. 1[illegible], defendant contends he cannot recover. However, it is uncontradicted that

Jason A. Thomas was not engaged in the business of selling real estate, and it appears from the evidence that he negotiated only this one transaction. The statute which requires a certificate of registration issued by the Department of Education and Registration (Cahill's Ill. Stat., chap. 17-A) is therefore not applicable. Killen v. Irmiter, 233 Ill. App. 116; O'Neill v. Sinclair, 153 Ill. 525.

There remains for consideration the question of whether plaintiff is entitled to recover on the merits as disclosed by the record, conceding that he is not a holder in due course. Here again there is little conflict in the evidence as to the material facts.

Defendant owned real estate he wished to sell, and he was introduced to Jason A. Thomas by a Mr. Morris, who brought Jason Thomas to defendant's home about September 1, 1928. From that date defendant saw Morris and Jason Thomas from time to time until the deal was finally closed on October 20, 1928. It is not denied that Jason Thomas procured the customer, George Sawiak, to whom defendant conveyed the property by warranty deed, dated October 31, 1928. After the deal was closed defendant executed and delivered to Jason Thomas the note upon which this suit was brought. It is dated October 20, 1928, by its terms is due 180 days after date with interest at 6 per cent per annum until paid, and is for the sum of $1700. At the same time defendant executed and delivered to Jason A. Thomas another note for the sum of $550, which was likewise for commissions. The lots were 30 in number and the purchase price was $1500 each. These notes therefore represented a commission of 5 per cent on the transaction.

Defendant testified that he told Jason A. Thomas that he did not like the idea of the deal at all and further:

"I told him at that time, now, I said, if I am going to sign this

Jason A. Thomas was not engaged in the business of selling real estate, and it appears from the evidence that he was licensed only this one transaction. The statute which requires a certificate of registration issued by the Department of Education and Registration (Cahill's Ill. Stat., chap. 17-a) is therefore not applicable. Kilian v. Kessler, 203 Ill. App. 116; Gaskin v. Gaskin, 163 Ill. 629.

There remains for consideration the question of whether plaintiff is entitled to recover on the merits as disclosed by the record, concerning that he is not a bona fide purchaser. Here again there is little conflict in the evidence as to the material facts.

Defendant stated that [illegible] to work, and he was introduced to Jason A. Thomas by a Mr. Smith, who brought Jason Thomas to defendant's home about September 1, 1922. From that date defendant saw Smith and Jason Thomas [illegible] the deal was finally closed on October 2, 1922. It is not denied that Jason Thomas procured the owner, [illegible], to sign defendant's conveyance the property by warranty deed, dated October 2, 1922. After the deal was closed [illegible] Jason Thomas the note upon which this suit was brought. It is dated October 20, 1922, by its terms is due [illegible] with interest at 6 per cent per annum until [illegible]. At the same time defendant executed a [illegible] to Jason Thomas for the sum of [illegible], which was also due [illegible]. The note was [illegible] the [illegible] [illegible]. These notes therefore represented a consideration of [illegible] the transaction.

Defendant testified that he told Jason A. Thomas [illegible] he did not like the idea of the deal [illegible]:

"I told him at that time, [illegible], I [illegible] [illegible]

> note on this condition, you make me note to that effect that it won't be due until I get my money, and he said, 'All right.' He sat down and he asked Morris, 'How will I word this?'"

He further testified:

> "He said that that note was all right, that they were to meet that day and if Sawiak hadn't taken up the lots it would be right, they could be renewed; and I took him at his word, otherwise I would not have signed."

This oral evidence as to what was said at the time of the execution of the note was objected to by plaintiff, but his objection was overruled.

It further appears that after the transfer of the note to Arthur J. Thomas, plaintiff, he wrote defendant on April 4th stating that he held the note and that it would fall due on April 6, 1929, and asked defendant to make arrangements "to honor the same by noon of that date." Defendant says that when he received that letter he called Jason Thomas up and that Morris and Jason Thomas came to his home and they went over the whole thing; that he told them that he thought the deal didn't look right because Morris owed him some money, but that Thomas said that he could do nothing and that he had sold the note to another.

On April 12, 1929, Jason A. Thomas wrote defendant a letter in which he said:

> "Referring to our interview ~~xxx~~ I hereby agree that should you have to repossess any portion of said property on account of nonpayment of same by said George Sawiak, I will refund to you from the commission which shall be paid me the sum of $65.00 for each lot remaining unpaid by the said George Sawiak and repossessed by you."

Defendant further testified that he did not know how many lots had been paid for; that according to the contract he was to receive the money when the building was under roof on each lot, and that he thought somewhere around 11 were then under roof; that lately he had not received the money because it was being paid to the Pioneer bank and not to him.

Jason A. Thomas testified that he had a conversation

note on this condition, you make no note to that effect that it won't be due until I get my money, and he said, 'All right.' He sat down and he asked Morris, 'How will I word this?'"

He further testified:

"He said that that note was all right, that they were to meet that day and if Dunlap hadn't taken up the note it would be right, they could be renewed; and I took him at his word, otherwise I would not have signed."

This oral evidence as to what was said at the time of the execution of the note was objected to by plaintiff, but his objection was overruled.

It further appears that after the transfer of the note to Arthur L. Thomas, plaintiff, he wrote defendant on April 4th stating that he held the note and that it would fall due on April 6, 1923, and asked defendant to make arrangements "to honor the same by noon of that date." Defendant says that when he received that letter he called Jason Thomas up and that Morris and Jason Thomas came to his home and they went over the whole thing; that he told them that he thought the deal didn't look right because Morris owed him some money, but that Thomas said that he could do nothing and that he had sold the note to another.

On April 12, 1923, Jason A. Thomas wrote defendant a letter in which he said:

"Referring to our interview was I hereby agree that should you have to repossess any portion of said property on account of nonpayment of same by said George Dawkins, I will refund to you from the commission which shall be paid me the sum of $25.00 for each lot remaining unpaid by the said George Dawkins and repossessed by you."

Defendant further testified that he did not know how many lots had been sold for; that according to the contract he was to receive the money when the building was under roof on each lot, and that he thought somewhere around 11 were sold under roof; that lately he had not received the money because it was going into the Pioneer bank and not to him.

Jason A. Thomas testified that he had a conversation

with defendant about the 8th or 10th of April, 1929, when Mr. Morris was present; that defendant said he would not meet the note at that time but would not object to meeting it after one-third of the buildings were up, and that he agreed to pay the entire note when ten lots were built on; that the buildings were to be considered built when the roofs were on, and that eleven at that time were under roof.

This testimony is not denied by defendant and therefore stands uncontradicted in the record.

Defendant contends on the authority of Bell v. McDonald, 308 Ill. 329; Foncannon v. Lewis, 327 Ill. 455; Owens v. Nagle, 334 Ill. 97, and Traders Investment Co. v. Kalas, 246 Ill. App. 511, that the oral evidence offered and received over objection was admissible to disprove the validity of the note. These cases construe section 55 of the Negotiable Instruments act, which provides in substance that the title of a person who negotiates an instrument is defective within the meaning of the act, when he obtains the instrument or any signature thereto by fraud, duress or force and fear, or any other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. Smith-Hurd's Ill. Rev. Stat. 1929, chap. 98, p. 1956. These cases in effect hold that parol evidence is admissible in order to show that the delivery of the note was purely conditional or was secured by means of fraud, and it is held in these cases that parol evidence does not under such circumstances contradict the terms of the writing or vary its legal import, but, on the contrary, tends to show that it was never delivered as a present contract. The distinction is pointed out in Handley v. Drum, 237 Ill. App. 587, and K.C.Killing Co. v. Sloan, 232 Ill. App. 266, a case construing a non-negotiable contract. Traders Investment Co. v. Kalas, 246 Ill. App. 511, and also other

with defendant about the 6th or 10th of April, 1930, when Mr. Morris was present; that defendant said he would not meet the note at that time but would not object to meeting it after one-third of the buildings were up, and that he agreed to pay the entire note when ten lots were built on; that the buildings were to be constructed built when the roofs were on, and that eleven at that time were under roof.

This testimony is not denied by defendant and therefore stands uncontradicted in the record.

Defendant contends on the authority of Bell v. McDonald, 308 Ill. 389; Kannenberg v. Lewis, 327 Ill. 458; Owens v. Sayle, 324 Ill. 97, and Trudeau Investment Co. v. Nelson, 366 Ill. App. 811, that the oral evidence offered and received over objection was admissible to disprove the validity of the note. These cases construe section 55 of the Negotiable Instruments act, which provides in substance that the title of a person who negotiates an instrument is defective within the meaning of the act, when he obtains the instrument or any signature thereto by fraud, duress or force and fear, or by other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. Smith-Hurd's Ill. Rev. Stat. 1939, chap. 98, p. 1938. These cases in effect hold that parol evidence is admissible in order to show that the delivery of the note was purely conditional or was secured by means of fraud, and it is held in these cases that parol evidence is not under such circumstances contradict the terms of the writing or vary its legal import, but, on the contrary, tends to show that it was never delivered as a present contract. The distinction is pointed out in Mandlay v. Drum, 237 Ill. App. 377, and Bank v. Williams v. Dixon, 232 Ill. App. 586, a case construing a non-negotiable contract. Trudeau Investment Co. v. Nelson, 366 Ill. App. 811, and other

cases on which defendant relies are distinguishable upon this ground.

The evidence here tends to show not a conditional but an unconditional delivery of the note. The evidence of defendant as to oral conversations before the execution of the notes tends to prove only a contemporaneous agreement attaching a condition as to the time when payment of the note should be made. This would vary the terms of the note. That such evidence is not admissible is established by authorities too numerous to require discussion in detail. Shinner v. Raschke, 213 Ill. App. 324; Beattie v. Browne, 64 Ill. 360; Johnson v. Glover, 121 Ill. 283. If this evidence is excluded (as it should have been) an overwhelming preponderance of the evidence establishes the right of plaintiff to recover.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for the amount of the note with interest at 6 per cent from date, amounting to in favor of the plaintiff appellant, Arthur J. Thomas, and against the defendant appellee, David Morgans.

REVERSED WITH A FINDING OF FACTS
AND JUDGMENT HERE FOR

McSurely, P. J., and O'Connor, J., concur.

cases on which defendant relies are distinguishable upon this ground.

The evidence here tends to show not a conditional but an unconditional delivery of the note. The evidence of defendant as to oral conversations before the execution of the notes tends to prove only a contemporaneous agreement attaching a condition as to the time when payment of the note should be made. This could vary the terms of the note. That such evidence is not admissible is established by authorities too numerous to require discussion in detail. Skinner v. Maguire, 213 Ill. App. 386; Pantle v. Krause, 64 Ill. 380; Johnson v. Glover, 141 Ill. 246. If this evidence is excluded (as it should have been) no overwhelming preponderance of the evidence establishes the right of plaintiff to recover.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for the amount of the note with interest at 6 per cent from date, amounting so in favor of the plaintiff appellant, Arthur L. Thomas, and against the defendant appellee, David Morgans.

REVERSED: FINDING OF FACTS
AND JUDGMENT HERE FOR.

McSurely, P. J., and O'Connor, J., concur.

FINDING OF FACTS.

The court finds as facts that at Chicago, Illinois, on October 20, 1928, defendant, David Morgans, made, executed and delivered his promissory note for the sum of $1700 due 180 days after date, for value received, to the order of Jason A. Thomas, with interest at six per cent per annum after date until paid; that said note was thereafter before maturity duly assigned by an endorsement on the back thereof in writing by said Jason A. Thomas to plaintiff, Arthur J. Thomas, who is now the owner and holder thereof; that there is due and unpaid upon said note the sum of $1700, together with interest at the rate of six per cent per annum from October 20, 1928, to January 27, 1930, amounting to the further sum of $129.48, and making a total sum due from defendant and appellee, David Morgans, to plaintiff and appellant, Arthur J. Thomas, of $1829.48, for which said sum the said Arthur J. Thomas is entitled to judgment against said David Morgans.

33777 FINDING OF FACTS.

The court finds as facts that at Chicago, Illinois, on October 20, 1928, defendant, David Morgans, made, executed and delivered his promissory note for the sum of $1700 due 180 days after date, for value received, to the order of Jason A. Thomas, with interest at six per cent per annum after date until paid; that said note was thereafter before maturity duly assigned by an endorsement on the back thereof in writing by said Jason A. Thomas to plaintiff, Arthur J. Thomas, who is now the owner and holder thereof; that there is due and unpaid upon said note the sum of $1700, together with interest at the rate of six per cent per annum from October 20, 1928, to January 27, 1930, amounting to the further sum of $180.44, and making a total sum due from defendant and appellee, David Morgans, to plaintiff and appellant, Arthur J. Thomas, of $1880.44, for which said sum the said Arthur J. Thomas is entitled to judgment against said David Morgans.

33793

PHILIP J. BRODERICK,
Appellee,

v.

GEORGE SIMLESA and
PAULINE SIMLESA,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff Broderick brought suit against defendants, George and Pauline Simlesa, in forcible detainer to secure possession of certain premises in the city of Chicago. There was a trial by the court and a finding for plaintiff and judgment against defendants. Motions for a new trial and in arrest were overruled, and defendants by this appeal seek to reverse the judgment.

The evidence, most of which is documentary in character, discloses little, if any, conflict.

It appears that on June 18, 1926, one Jane McManus was the owner of these premises. On that date, she entered into articles of agreement in writing and under seal with defendants, whereby it was provided that if defendants would first make the payments and perform the covenants mentioned therein, she, as party of the first part, covenanted and agreed to convey to them the premises by warranty deed. The purchase price was $9,000. The agreement recites that $1500 was paid; that the premises were subject to a first mortgage of $3500, due in about five years, which defendants agreed to assume and pay; that they further agreed to pay the balance of $4,000 in installments of $50 or more on July 18, 1926, and the same amount on the 18th day of each and every month thereafter until the same was fully paid, with interest at 6% per annum, payable monthly, on the whole sum remaining from time to

33793

PHILIP J. BROSSELION,
Appellee,

v.

GEORGE HIGGINS and
PAULINE GIMIGES,
Appellants.

APPEAL FROM JUDICIAL
COURT OF COOK CO.

MR. JUSTICE MACKNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff Broselion brought suit against defendants, George and Pauline Gimiges, to foreclose a mortgage to secure possession of certain premises in the city of Chicago. There was a trial by the court and a finding for plaintiff and judgment against defendants. Motions for a new trial and in arrest were overruled, and defendants by this appeal seek to reverse the judgment.

The evidence, most of which is documentary in character, discloses little, if any, conflict.

It appears that on June 16, 1926, one Jane Bodkin was the owner of these premises. On that date, she entered into articles of agreement in writing and under seal with defendants, whereby it was provided that if defendants could take care the payments and perform the covenants ambiguous therein, she, on payment of the first part, covenanted and agreed to convey to them the premises by warranty deed. The purchase price was $[illegible].

The agreement recites that $150 was paid; that the premises were subject to a first mortgage of $[illegible], due in about five years, which defendants agreed to assume and pay; that they further agreed to pay the balance of $4,000 in installments of $[illegible] or more on July 16, 1926, and the same amount on the 16th day of each and every month thereafter until the same was fully paid, with interest at [illegible] per annum, payable monthly, on the whole sum remaining from time to

time unpaid.

The agreement also provided that defendants should pay taxes and assessments subsequent to the year 1925; that in case of the failure of defendants to make either of the payments, or any part thereof, or perform any of the covenants on their part, the agreement should, at the option of the party of the first part, be forfeited and determined, and defendants should forfeit all payments made by them; that such payments should be retained by the party of the first part in full satisfaction and liquidation of all damages sustained by her and that she should have the right to re-enter and take possession of the premises.

Following the last clause is a typewritten statement on the face of the contract in these words "Sixty (60) Days' notice in writing." The contract also provides that the time of payment should be of the essence of the contract.

By a writing on the back thereof, Jane McManus assigned and transferred all her right, title and interest to plaintiff and on April 3, 1929, Jane McManus by a quit-claim deed conveyed and quit-claimed the premises to plaintiff and the deed was duly acknowledged, delivered and recorded.

The contract between Jane McManus and defendants made on June 18, 1926, was placed with a real estate broker, Patrick J. Grady, at the time of its execution in order that he might receive the payments to be made thereon. Payments were made from time to time to him by defendants, and as the payments were made they were noted in appropriate blanks on the back of the contract. The last payment was made on February 18, 1929, and defendants made no payments whatever thereafter.

On May 23, 1929, plaintiff served notice on defendants that he had elected to declare the agreement forfeited and determined and demanded immediate possession of the premises.

time unpaid.

The agreement also provided that defendants should pay taxes and assessments which went to the year 1923; that in case of the failure of defendants to make either of the payments, or any part thereof, or perform any of the covenants on their part, the agreement should, at the option of the plaintiff, be forfeited and cancelled, and defendants should forfeit all payments made by them; that such payments should be retained by the party of the first part in full satisfaction and liquidation of all damages sustained by her and that she should have the right to re-enter and take possession of the premises.

Following the last clause is a typewritten statement in the face of the contract in these words: "Key (Mr.) agrees notice in writing." The contract also provides that the time of payment should be of the essence of the contract.

By a mistake on the part thereof, they failed to plead and transcribed all her rights, title and interest to plaintiff and on April 3, 1923, came defendant by a quit-claim deed conveying the quit-claimed the premises to plaintiff as the deed was duly acknowledged, delivered and recorded.

The contract between these defendants was delivered and on June 13, 1923, was placed with a real estate broker, Patrick G. Grady, at the time of its execution in order that he might receive the payments to be made thereon. Payments were made from time to time to him by defendants, and on his payments were duly credited in appropriate blanks on the back of the contract. The last payment was made on January 13, 1924, and defendants made no payments whatever thereafter.

On May 20, 1926, plaintiff served notice on defendants that he had elected to declare the agreement forfeited and terminated and demanded immediate possession of the premises.

The broker had at his office a warranty deed from Jane McManus, bearing date of September 19, 1928, in and by which she purported to convey these premises to defendants. It was the intention that upon the necessary payments being made this warranty deed should be delivered to defendants and that they at the same time would execute and deliver a note for the balance due, amounting to $2,422, secured by a trust deed upon the real estate. This warranty deed, trust deed and notes had been drawn up for the purpose of carrying out this arrangement. The trust deed and note were never executed, but the deed from Jane McManus to defendants was through error of an employee in the broker's office filed for record in the office of the recorder of Cook county and recorded September 27, 1928. Repeated demands were made by the broker after February 18, 1929, for payments under the terms of the written agreement, but Pauline Simlesa told the broker that she and her husband had no money and were unable to continue the payments.

On March 8, 1929, defendants made a deed purporting to convey this real estate to the mother and father of Mrs. Simlesa, but upon a threat from the broker that they might be put in jail for so doing, another deed was made conveying the property back to defendants.

The facts as above stated are, we believe, uncontradicted in the record.

Defendants contend in this court, in the first place, that the Municipal court of Chicago was without jurisdiction to try questions of title in this proceeding, citing Hooper v. Buvidas, 239 Ill. App. 596, and numerous other authorities cited in that opinion. There is no question about that rule. The issue in an action of this kind is always the right to possession, but it does not follow that deeds which might tend to establish or disprove title are therefore inadmissible. There was and could be no

The broker had at his office a warranty deed from Jane Coleman, bearing date of September 1, 1928, in and by which she purported to convey these premises to defendants. It was the intention that upon the necessary payments being made this warranty deed should be delivered to defendants and that they at the same time would execute and deliver a note for the balance due, amounting to $3,422, secured by a trust deed upon the real estate. This warranty deed, trust deed and notes had been drawn up for the purpose of carrying out this arrangement. The trust deed and note were never executed, but the deed from Jane Coleman to defendants was through error of an employee in the broker's office filed for record in the office of the recorder of Cook County and recorded September 27, 1928. Repeated demands were made by the broker after February 18, 1929, for payments under the terms of the written agreement, but faulty excuses told the broker in 1929 and 1930 that defendants had no money and were unable to continue the payments.

On March 6, 1929, defendants made a deed purporting to convey this real estate to the mother, Esther [illegible]. Immediately upon a threat from the broker that a suit might be put in jail for so doing, another deed was made conveying the property back to defendants.

The facts as above stated are, we believe, correctly stated in the record.

Defendants contend in this court, as the trial judge, that the Municipal Court of Chicago was without jurisdiction to try questions of title in this proceeding, citing Hogan v. Hogan, 259 Ill. 199, 202, and numerous other authorities cited in the opinion. There is no question about this rule. The issue in an action of this kind is always the right to possession, but it does not follow that deeds which might be used to establish or improve title are therefore inadmissible. There can and could be no

question tried out in this proceeding as to the title. The deeds would have been material had an action been brought which put the title in issue. They were also material and proper evidence as tending to establish or disprove the right of possession.

Defendants next contend that the evidence fails to prove that plaintiff was ever in possession of the premises and that he cannot maintain an action of forcible detainer for that reason. Defendants cite Thompson v. Bornberger, 59 Ill. 326, a decision in which a former Forcible Entry and Detainer Act is construed, and Whitehill v. Cooke, 140 Ill. App. 520, a decision, construing the present statute, which follows that case.

Whitehill v. Cooke, as the opinion in that case discloses, was a proceeding under the first and second clauses of section 2 of the Forcible Entry and Detainer act (see Smith-Hurd's Ill. Rev. Stat. 1929, chap. 57, p. 1537, sec. 2), while this proceeding is brought under the fifth clause of said section 2, which in substance provides that when a vendee has obtained possession under a written or verbal agreement to purchase lands or tenements and has failed to comply with his agreement and withholds possession of the premises after demand in writing by the person entitled to possession, the action may be brought. In a similar proceeding, where, as here, there was an assignment of the contract for purchase together with the execution and delivery of a deed, we held this evidence sufficient to show possession. Stevens v. Weyer, 169 Ill. App. 469. Moreover, it would appear that defendants are estopped to interpose this defense. Lesher v. Sherwin, 86 Ill. 420.

Defendants next contend that the judgment cannot stand because the notice was insufficient. They say that the articles of agreement provided that in case of default sixty days notice in writing of the intention to declare a forfeiture should be given and that this provision was not complied with but instead demand for

question taken out in this proceeding as to the title. The deeds would have been material had an action been brought which put the title in issue. They were also material and proper evidence as bearing on estoppel or disprove the claim of possession.

Defendants next contend that the evidence fails to prove that plaintiff was ever in possession of the premises and that he cannot maintain an action of forcible entry for that reason. Defendants cite Thompson v. Jones, 82 Ill. 162; a decision in which a former forcible entry and detainer suit is concerned, and Whitehill v. Cooke, 129 Ill. 396, a decision concerning the present statute, which follows that case.

Whitehill v. Cooke, as the opinion in that case discloses, was a proceeding under the first and second clauses of section 1 of the forcible entry and detainer act (Ill. Rev. Stat. 1929, ch. 57, p. 1327, sec. 1), while this proceeding is brought under the fifth clause of said section 1, which in substance provides that when a vendee has obtained possession under a written or verbal agreement to purchase lands or tenements and has fail to comply with his agreement and wilfully withholds possession of the premises after demand in writing by the person entitled to possession, the tenant may be brought. In a similar proceeding, supra, we have, there was an assignment of the contract for purchase together with the possession and delivery of a deed, so held this was sufficient to show possession. Thomas v. Ayer, 165 Ill. 394, 396. Ayer's is would appear it a decision as to property in the proper sense. Langhus v. Thomas, 26 Ill. 400.

Defendants also contend that the judgment should stand because the notes are insufficient. They say that the contract or agreement provided that in case of default after due notice in writing of the intention to declare forfeiture, [illegible] and that this provision was not complied with. Instead, [illegible]

immediate possession was served upon defendants eight days before the suit was begun.

As already stated, there appears in the body of the contract in an appropriate blank the typewritten clause, "Sixty (60) days notice in writing," but it is scarcely possible to determine to what matter in the contract this clause refers. It does not state who is to give the notice nor to whom the notice is to be given, nor concerning what matter it is to be given. Indeed, the meaning of the clause seems to be so uncertain that it is impossible to give effect to it. If, however, it is assumed that this clause requires sixty days notice before forfeiting the contract or reentering, it would seem that defendants by their wrongful conveyance of the title waived any such supposed right under the contract. Moreover, under the terms of the contract, upon default of defendants plaintiff had a right to possession whether he did or did not elect to forfeit the contract.

Defendants say that forfeitures are not regarded with special favor by the courts, and this is very true as was pointed out in United Electric Coal Co. v. Keefer Coal Co., 249 Ill. App. 222, a case on which defendants rely. The uncontradicted evidence in this case, however, shows that defendants have not been harshly treated; that they were repeatedly requested to make payments which were due, which they declined to make, and that taking an unconscionable advantage of the mistake which resulted in the recording of an undelivered deed to them they attempted to deprive plaintiff of all his rights in and to the premises. Defendants, however, disclaim any intention to forfeit the contract in this proceeding and say that question is left for determination of a court of equity.

The judgment of the trial court is in every respect just and it is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

immediate possession was served upon defendants eight days before the suit was begun.

As already stated, there appears in the body of the contract in an appropriate blank the typewritten clause, "Sixty (60) days notice in writing," but it is scarcely possible to determine to what matter in the contract this clause refers. It does not state who is to give the notice nor to whom the notice is to be given, nor concerning what matter it is to be given. Indeed, the meaning of the clause seems to be so uncertain that it is impossible to give effect to it. If, however, it is assumed that this clause requires sixty days notice before forfeiting the contract or re-entering, it would seem that defendants by their wrongful conveyance of the title waived any such supposed right under the contract. Moreover, under the terms of the contract, upon default of defendants plaintiff had a right to possession whether he did or did not elect to forfeit the contract.

Defendants say that forfeitures are not regarded with special favor by the courts, and this is very true as was pointed out in United Fuel Gas Co. v. Keefer Coal Co., 247 Ill. App. 222, a case on which defendants rely. The unconstitutional act cited in this case, however, shows that defendants have not been unfairly treated; that they were repeatedly requested to make payments which were due, which they declined to make, and that taking an unconscionable advantage of the mistake which resulted in the recording of an undelivered deed to them they attempted to deprive plaintiff of all his rights in and to the premises. Defendants, now, disclaim any intention to forfeit the contract in this proceeding and say that question is left for determination of a court of equity. The judgment of the trial court is in every respect just and it is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

33811

JOSEPH J. BOBIN,
Appellee,

vs.

R. E. FORD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

255 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Bobin sued Ford to recover for damage to his automobile sustained in a collision with defendant's automobile on January 22, 1926, at the intersection of Montrose and Hermitage avenues, Chicago.

Plaintiff alleged that he was at the time of the collision exercising due care and that the negligence of defendant was the cause of the accident.

Defendant in his amended affidavit of merits averred that plaintiff was at fault and denied that he was in any respect negligent. Defendant further averred that at the time in question he was not operating his automobile, nor present, but that the driver of it was using it solely for his own pleasure and not for any use of defendant.

Judgment was entered for plaintiff on the finding of the court for $141.90. Plaintiff has not appeared in this court to support the judgment.

The accident occurred about 1:30 o'clock in the morning. Plaintiff was on his way home, driving west on Montrose avenue. The driver of defendant's car, a brother of defendant, was driving south on Hermitage avenue. Upon cross-examination plaintiff was shown a written statement signed by him purporting to describe the accident, and in response to questions he stated:

"If that statement says that when the front part of my car was about in line with the east curb of Hermitage the other car

33021

JOSEPH I. ROBIN,
Appellee,

vs.

R. E. YOUE,
Appellant.

WEAR MOTOR CAR COURT
OF CHICAGO.

Abst. 637

Mr. JUSTICE MATHEWS DELIVERED THE OPINION OF THE COURT.

Robin sued Youe to recover for damage to his automobile sustained in a collision with defendant's motorcycle on January 22, 1924, at the intersection of Rockwell and Montrose avenues, Chicago.

Plaintiff alleged that he was at the time of the collision exercising the care and that the negligence of defendant was the cause of the accident.

Defendant in his answer denied allegations of notice averred that plaintiff was at fault and should bear the brunt of any injury negligent. Defendant further averred that at the time of the collision he was not operating the motorcycle, nor present, but was the driver of it was using it solely for his own pleasure and not for any use of defendant.

Judgment was entered for plaintiff on the finding of the court for $141.00. Plaintiff's car was damaged to the extent to support the judgment.

The evidence centered about the collision in the morning. Plaintiff was on his way home, driving east on Montrose avenue. The driver of defendant's car, a product of [illegible], was driving south on Rockwell avenue. [illegible] shown a violent [illegible] accident, and it resulted in [illegible].

"If that statement [illegible] was about in line with the east curb of Montrose avenue

was about on a line with the north curb of Montrose, I will not deny the statement."

The driver of defendant's car on cross-examination testified:

"As I approached Montrose and looked to my left, I did not see any car coming. I looked to my right, and saw no car coming. I then proceeded to cross the intersection, and did not again look to my left until the young lady halloed."

This witness further testified:

"I did not own that car; it was my brother's car. I was not operating it on his business; it was a pleasure trip. My brother knew I took the car; I had the keys to it; I always have taken it."

The preponderance of the evidence therefore indicates that as these two cars approached the intersection and reached the intersection at about the same time, defendant had the right of way and plaintiff must be held to have been negligent. Partridge v. Eberstein, 225 Ill. App. 209; Fisher v. Johnson, 238 Ill. App. 25; Piper & Co. v. Yellow Cab Co., 246 Ill. App. 487; Johnson v. Duke, 247 Ill. App. 372; Heidler Lumber Co. v. Wilson & Bennett Co., 243 Ill. App. 89.

Moreover, on the uncontradicted evidence we think defendant was not liable for the reason that his automobile was not being operated for his uses, purposes or business. Arkin v. Page, 287 Ill. 420; Reinick v. Smetana, 205 Ill. App. 321; Graham v. Page, 220 Ill. App. 431; Freeman v. Dixon, 233 Ill. App. 196; Scott v. Greene, 242 Ill. App. 405.

For the reasons indicated the judgment is reversed with a finding of facts and judgment here for defendant.

REVERSED WITH FINDING OF FACTS AND
JUDGMENT HERE FOR DEFENDANT.

McSurely, P. J., and O'Connor, J., concur.

see about on a line with the north curb of Oxford, I will not deny the statement."

The driver of defendant's car on cross-examination testified:

"As I approached Montrose and looked to my left, I did not see any car coming. I looked to my right, and saw no car coming. I then proceeded to cross the intersection, and did not again look to my left until the young lady hailed."

This witness further testified:

"I did not own that car; it was my brother's car. . . was not operating it on this occasion; it was a pleasure trip. My brother knew I took the car; I had the keys to it; I always have taken it."

The preponderance of the evidence therefore indicates that as these two cars approached the intersection and reached the intersection at about the same time, defendant had the right of way and plaintiff must be held to have been negligent. Christian v. Sherman, 216 Ill. App. 327; Ely v. Johnson, 216 Ill. App. 48; Plant v. Illinois Cab Co., 240 Ill. App. 407; Lynch v. Duke, 247 Ill. App. 27; Miller v. Illinois Bankers Co., 245 Ill. App. 38.

However, on the undisputed evidence we think the finding was not liable for the crime [illegible] being operated by her in a way, particular [illegible] Smith v. Ryan, 287 Ill. 190; Gaddis v. Gaddis, 305 Ill. App. 311; [illegible] 229 Ill. App. 401; Freeman v. Dixon, [illegible]; [illegible] Grace, 242 Ill. App. 465.

For the reasons indicated we [illegible] a reversal of the judgment of the lower court.

[illegible]

Reversed.

Lindsay, P. J., and O'Connor, J., concur.

FINDING OF FACTS.

We find as facts that at the time of the collision in question the driver of defendant's automobile had the right of way at the crossing where the collision occurred and was not guilty of negligence proximately tending to bring about the collision; further, that the automobile owned by defendant was by his permission being driven by a brother of defendant for this brother's own pleasure and not for defendant's use nor for his business nor by his direction; that defendant is therefore not liable to plaintiff; that the negligence which caused the damage to plaintiff's automobile was not the negligence of defendant but the negligence of plaintiff, and that judgment should be entered on this finding in this court in favor of defendant and against plaintiff.

Finding of Fact.

We find as facts that at the time of the collision in question the driver of defendant's automobile had the right of way at the crossing where the collision occurred and was not guilty of negligence proximately tending to bring about the collision; further, that the automobile owned by defendant was by his permission being driven by a brother of defendant for this brother's own pleasure and not for defendant's use nor in his business nor by his direction; that plaintiff is therefore not liable to plaintiff; that the negligence which caused the damage to plaintiff's automobile was not the negligence of defendant but the negligence of plaintiff, of which indeed enough is entered on this finding in this court in favor of defendant and against plaintiff.

53836

JENNIE COHEN,
Appellee,
vs.
HENRY I. SAXTON,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On June 11, 1929, Jennie Cohen brought suit against Henry I. Saxton in the Superior court. She filed a declaration of two counts in which she averred that an automobile in which she was riding collided on a public highway with an automobile driven by defendant; that the collision was caused by defendant's negligence and that she thereby received personal injuries. One of the counts charged malice generally, without averring any facts from which such malice might be inferred. She claimed damages in the sum of $25,000.

On the same day plaintiff filed her petition in the action at law, setting up that she had begun suit; that her claim was for unliquidated damages in the sum of $25,000; that defendant was not a resident of Cook county in this state but that he was a resident of New Orleans in the state of Louisana; that while now temporarily within Cook county, he would speedily leave the state and was about to leave the state, taking his property with him. She prayed that a writ of ne exeat issue.

Thereupon Judge Lewis of the Superior court entered an order directing that the ne exeat writ issue, returnable to the next term of court, upon petitioner's filing a bond in the sum of $1,000 and that the clerk endorse upon the writ that defendant be required to give bail in the sum of $5,000.

The writ then issued and was duly executed by the sheriff arresting Saxton, who failing to give bond was committed to jail. On June 13th by order of court the bail was reduced to $4,000 and Saxton was released upon giving cash bail.

No. 23256

JERMIN COWAN, Appellee,	
vs.	
HENRY I. BAXTON, Appellant.	

A FINAL FROM THE SUPREME COURT OF ADAMS COUNTY.

MR. JUSTICE BATCHELDER DELIVERED THE OPINION OF THE COURT:

On June 11, 1917, Jermin Cowan brought suit against Henry I. Baxton in the Superior Court. He filed a declaration of two counts in which his asserted that on the 9th day of June, he was riding unlicensed on a public highway with an automobile driven by defendant; that the collision was caused by defendant's negligence and that he thereby received serious injuries. One of the counts charged malice generally, without specifying any facts from which such malice might be inferred. His claimed damages in the sum of $25,000.

In his same he plaintiff filed his petition in the action of law, setting up that one had been sued; that his claim was for unliquidated damages in the sum of $25,000; that defendant was not a resident of Cass county in this state but that he was a resident of New Orleans in the state of Louisiana; that while now temporarily [illegible] county, he owned personally leased one house and was about to [illegible] property with him. He prayed that a writ issue [illegible] Cass Superior Court.

[illegible] Judge [illegible] the Superior Court entered an order directing that the [illegible] writ issue, [illegible] to the next term of court, upon [illegible] filing a [illegible] in the sum of $1,000 and that the clerk [illegible] the writ that defendant be required to give bond in the sum of [illegible].

The writ issued [illegible] duly executed by the sheriff attaching [illegible], who failing to give bond was committed to jail. On June 1917 by order [illegible] the bail was reduced to $4,000 and Baxton was released upon giving such bond.

On June 29th thereafter an order was entered denying motions by Saxton to vacate the order of June 11th and to reconsider the action of the court theretofore made in denying the motion to set aside, and from that order this appeal has been perfected.

Motion in behalf of Jennie Cohen has been made in this court to dismiss the appeal, and that motion has been reserved to the hearing.

It is urged as the first ground for the allowance of the motion that there is a discrepancy in the order appealed from and the recital of the bond given, and it is therefore urged upon the authority of Curry v. Hinman, 8 Ill. 90, that the appeal should be dismissed. The order which appears in the common law record is somewhat indefinite but it is fully explained by recitals in the bill of exceptions. However, plaintiff contends, on the authority of West Chicago St. R. R. Co. v. Scanlan, 68 Ill. App. 626 (affirmed in 168 Ill. 34); and Nat'l Commission Co. v. Lane, 97 Ill. App. 418, that we have no right to consider the bill of exceptions with relation to the allowance and perfection of the appeal.

In West Chicago St. R. R. Co. v. Scanlan, the court denied a motion to dismiss made upon the ground that it was not shown in the bill of exceptions that the appeal was prayed for and allowed, and, in the course of the opinion, stated that the proper place for the prayer and allowance of the appeal was in the common law record of the case and not in the bill of exceptions. However, that case does not hold, and the cases cited do not hold, that the construction of the order allowing an appeal may not be aided by facts made to appear in the bill of exceptions. The motion to dismiss cannot prevail on this ground.

As to the second contention, it is well established by the authorities that in the absence of a statute expressly authorizing it, an interlocutory order is not appealable. The

On June 28th thereafter an order was entered denying motions by Saxton to vacate the order of June 11th and to reconsider the action of the court thereto[illegible] while in denying the motion to set aside, and from that order this appeal has been perfected.

Motion in behalf of Jamie Lohse has been made in this court to dismiss the appeal and that motion has been reserved to the hearing.

It is urged as the first ground for the allowance of the motion that there is a discrepancy in the order appealed from and the recital of the bond given, and it is therefore urged upon the authority of Curry v. Hinman, 8 Ill. 90, that the appeal should be dismissed. The order which appears in the common law record in somewhat indefinite but it is fully explained by recitals in the bill of exceptions. However, obviously unimportant, on the authority of West Chicago St. R. Co. v. Scanlan, 65 Ill. App. 386 (affirmed in 166 Ill. 34); and Ewell Construction Co. v. Lane, 97 Ill. App. 412, that we have no right to consider the bill of exceptions with relation to the allowance and certification of the appeal.

In Kay Quinn & Co. v. [illegible], the court denied a motion to dismiss made upon the ground that it was not shown in the bill of exceptions that the appeal was taken or allowed, and, in the [illegible] opinion, stated that the proper [illegible] for the proof of allowance [illegible] appeal was in the common law record of the term and not in the bill of exceptions. However, that case does not hold, [illegible] that the construction of the order allowing an appeal may be aided by facts made to appear in the bill of exceptions. The motion to dismiss cannot overrule on this ground.

As to the second proposition, it is well established by the authorities that in the absence of a bond, necessarily authorizing it, an interlocutory order is not appealable. The

right to appeal is purely statutory (People v. Andrus, 299 Ill. 56), and generally in the absence of a special statute only final orders are reviewable upon appeal. (Kircher v. Hendill, 239 Ill. App.496.) Thus an order overruling a demurrer of defendant to a bill which shows that defendant elected to stand by his demurrer is not appealable. Miller v. Bunn, 336 Ill. 203, and cases there cited.

A final decree is not, however, necessarily the last order in a cause; on the contrary, it is any order or decree which finally determines and adjudicates the rights of the parties. People v. Ill. State Bank, 312 Ill. 613, and cases there cited. Defendant had the right at any time to move that the writ be quashed or set aside. (Zimmer v. Thompson, 286 Ill. 325), and the denial of his motion in that respect finally determined the rights of the parties on that issue.

The motion to dismiss will be denied.

Defendant contends that the writ should have been quashed and set aside, first, because it was issued by a court of law, while jurisdiction to issue the same is vested only in courts of chancery, and, secondly, because the writ may be issued only in aid of liquidated as distinguished from unliquidated claims, while this claim was concededly unliquidated.

A consideration of these questions involves the construction of chapter 97 of the Illinois Statute entitled, "An Act to review the law in relation to ne exeat, approved March 12, 1874, (Smith-Hurd's Ill. Rev. Stat. 1929, pp. 1944-5.) It must be conceded that except as modified by this statute, the rules of law, as previously applied in England, are applicable in cases of this character. Cable v. Alvord, 27 Ohio St. 654; McDonough v. Gayner, 18 N. J. Eq. 249; Rice v. Hale, 59 Mass. 238.

The authorities seem to agree that the writ originally was a high prerogative writ issued only at the command of the sovereign for state reasons, but in the reign of Elizabeth the writ

right to appeal is purely statutory (Conway v. Conway, [illegible] Ill. [illegible]) and generally in the absence of a special statute only final orders are reviewable upon appeal. (Gilmore v. Gamble, [illegible] Ill. App. [illegible]). Thus an order overruling a motion for dismissal in a [illegible] action shows that defendant should be stayed by his demurrer [illegible] not appealable. Miller v. Dunn, [illegible] Ill. [illegible]. and [illegible] [illegible].

A final decree is not, however, necessarily the last order in a cause; it is any order or decree which finally determines and adjudicates the rights of the parties. People v. Ill. Waste Mfgr., [illegible] Ill. App. [illegible], [illegible] [illegible]. Defendant had the right at any time to show that he was [illegible] or not said. (Wilmore v. [illegible], [illegible] Ill. [illegible]), and the denial of his motion in that respect [illegible] the rights of the parties [illegible].

[illegible]

[illegible]

[illegible] tion, while jurisdiction [illegible] of [illegible], [illegible] of [illegible], [illegible] all of [illegible] claims, while this claim was concededly unliquidated.

A court [illegible] tion of [illegible] Ill. [illegible] "[illegible] review the law in [illegible] case. [illegible], [illegible] (Smith-[illegible] Ill. App. [illegible], [illegible], [illegible]) [illegible] cited that account as [illegible] by this [illegible], [illegible] must only consider in [illegible], [illegible] character. People v. Alvord, [illegible] Ill. [illegible]; [illegible] in 2. [illegible] 240; [illegible] v. [illegible], [illegible] [illegible].

The [illegible] was [illegible] was a [illegible] [illegible] only [illegible] covering the state [illegible], [illegible] [illegible]

was diverted to the aid of chancery and the administration of remedial justice. Cyc. Pleading & Practice, vol. 14, pp. 318-28. Courts of chancery seem to have had exclusive jurisdiction to issue the writ and then only in aid of an equitable debt, in fact due and certain in amount.

Plaintiff contends that the Illinois statute gives to courts of law jurisdiction to issue this writ. It may not be denied that the statute has materially changed the ancient law and practice. The writ here issued from a court of law, and the first question for our determination is whether jurisdiction so to do is vested in that court. Plaintiff cites Lewark v. Dodd, 288 Ill. 60, The opinion in that case does not refer to this statute. The proceeding there was one to construe a will. It was urged against the final decree that no issue of law was properly made up, and in overruling that contention the court in effect said that under our system where the same judge exercises both common law and chancery jurisdiction in the same court at the same time, it had become unnecessary in procedural matters to follow some of the rules which existed at the time when a different system prevailed. That case is not analogous to this.

Plaintiff also cites 19 Ruling Case Law, 1347, where that authority states:

> "The rule requiring the debt to be due has been changed by statutes authorizing the courts to grant the writ in a case where the debt or demand is not absolutely due, but exists fairly and bona fide in expectancy at the time of making the application. It is obvious that these acts have overturned and superseded the whole doctrine of the English law upon this subject, and made the writ of ne exeat applicable to all sorts of liabilities - due or undue - certain or otherwise - if they, bona fide, exist in expectancy at the time the writ is applied for."

McGee v. McGee, 8 Ga. 295, is cited by the author, but the proceeding there was by a bill in chancery and the writ was granted prior to a decree for alimony in aid of the wife's right to support. The Supreme court of Georgia, recognizing that the ancient rule was

was diverted to the aid of chancery and the civil [illegible] remedial justice. Cyc. Pleading & Practice, vol. 14, pp. 11-12. Courts of chancery came to have had exclusive jurisdiction to issue the writ and then only in aid of an equitable suit, in fact due and certain in amount.

Plaintiff [illegible] that the Illinois statutes gives the courts of law jurisdiction to issue [illegible]. It may not be denied that [illegible] [illegible] originally [illegible] [illegible] [illegible] the [illegible]. The writ [illegible] issued from a court of law, and the first question for our determination is [illegible] [illegible] is vested in that court. Plaintiff cites [illegible] v. Todd, [illegible]. The opinion in that case does not refer to this statute. The proceeding there was one to [illegible] a bill [illegible] against the final decree that no issue of law was [illegible], and in overruling this contention the court in effect said that under our system where the same judge exercises both [illegible] jurisdiction in the same court at the same time, it had become unnecessary in procedural matters to [illegible] the rule [illegible] at the time when a different system prevailed. [illegible] is not analogous to this.

[illegible] cites [illegible], which [illegible] that authority states:

> "The [illegible] [illegible] by statute [illegible] the courts to grant the writ in a case where [illegible] [illegible] it exists [illegible] and [illegible] [illegible] the conditions. [illegible] extended [illegible] [illegible] this [illegible] [illegible] liabilities [illegible] bona fide, [illegible] fee."

Nolen v. Reeves, [illegible], [illegible] there was by bill in chancery [illegible] a decree for alimony [illegible]. [illegible] Supreme Court of Georgia, recognizing that the ancient rule was

otherwise but construing a statute somewhat similar to ours, affirmed the judgment of the trial court. Hampton v. Pool, 28 Ga. 514, is also cited, but an examination discloses that the proceeding there also was by a bill in chancery, in which complainant sought to recover purchase monies paid by him for land from which he had been evicted by paramount title. The proceeding involved an accounting. The bill prayed a writ ne exeat. Whether it was issued is not stated. A decree for complainant was reversed on appeal.

Plaintiff also cites Lucas v. Hickman, 2 Stew. Ala. 111, 19 Am. Dec. 44. In that case Lucas filed a bill in equity against Hickman for a writ of ne exeat, setting up that he had a suit at law pending against Hickman upon a promissory note; that Hickman was about to remove from the state and sell a greater portion of his real estate, and that unless he, Lucas, obtained a writ of ne exeat he would not be able to enforce any judgment recovered. The writ was granted in vacation but in term time his bill was dismissed with costs, and Lucas appealed. The court said that where the action was purely legal, as ancillary to an action at law, equity would not generally interfere, but that in cases where the courts of law and equity have concurrent jurisdiction and the defendant had not been held to bail in the action at law, the writ would be granted, and cited Porter v. Spencer, 2 John. Ch. 169, an action for account at law where the chancellor with hesitation granted the writ.

The opinion in Lucas v. Hickman enumerates the cases in which the writ would be granted as follows: (1) where the defendant was about to remove beyond the jurisdiction and the demand was exclusively of an equitable nature, whether a sum certain was due or not; (2) where the courts of law and equity have concurrent jurisdiction and the defendant was about to remove and had not been held to bail in the action at law; (3) where the two courts have

otherwise but construing a statute somewhat similar [illegible], affirmed the judgment of the trial court. Kempton v. [illegible], [illegible] 554, is also cited, but an examination discloses that the [illegible] there also was by a bill in chancery, in which complainants sought to recover purchase [illegible] paid by him for land from which he had been evicted by paramount title. The proceeding involved an accounting. The bill prayed a writ ne exeat. Whether it was issued is not stated. A decree for complainant was reversed on appeal.

Plaintiff also cites [illegible] v. [illegible], [illegible] Ill, 29 Am. Dec. 35. In that case one filed a bill in equity against Dickman for a writ of ne exeat, setting up that he had a suit at law pending against Dickman upon a promissory note; that Dickman was about to remove from the state [illegible] tion of his real estate, had [illegible], obtained a writ of ne exeat [illegible]. The writ was granted [illegible] missed [illegible] the action was purely legal, [illegible] equity would not generally interfere, [illegible] courts of law and equity have concurrent jurisdiction [illegible] Defendant had not been [illegible], the writ would be granted, [illegible] action for account [illegible] granted the writ.

The opinion in [illegible] v. [illegible] [illegible] in which the writ would be granted [illegible] fendant was about to remove [illegible] was exclusively of an equitable nature, [illegible] one or not; [illegible] jurisdiction [illegible] held to lie in the action [illegible]

concurrent jurisdiction and no action had been commenced at law but suit had been instituted in equity; (4) where from the extreme necessity of the case and to prevent a failure of justice it became necessary. The court, however, stated:

> "But this fourth proposition, though it seems to be sanctioned by authority, I have some hesitation in admitting to be law. 'Extreme necessity, and to prevent a failure of justice,' appears to me to open a door too wide, even for the Chancellor's discretion, and which in many instances may be liable to abuse."

These cases are very far from authorities for the proposition that a court of law may issue a writ of ne exeat in aid of an action at law. The action here is one purely at law in tort for negligence. It can hardly be contended that a court of chancery would have concurrent jurisdiction with a court of law in such a case.

A consideration of the language in the act also precludes the construction of it for which plaintiff contends. The first section provides in substance that the writ may issue, as well in cases where the debt or demand is not actually due but exists fairly and bona fide in expectancy at the time of making application, as in cases where the demand is due, and that it shall not be necessary, to authorize the granting of such writ, that the applicant show that his "debt or demand" is purely of an equitable character and cognizable only before a court of equity.

If it had been the intention of the legislature to change the ancient rule and grant jurisdiction to the law courts to issue this writ, it seems strange indeed that the legislature did not say so. It did not say so, but on the contrary in the different sections of the act referring to procedure uses language which indicates an intention that the power to issue the writ should remain exclusively in the chancery court. Section 4, for instance, provides that when no judge authorized to issue the writ is present in the county, or is incapacitated, or unable to act, a master in chancery

may order the writ to issue. Section 5 provides: "No writ of ne exeat shall be granted but upon bill or petition filed."

Section 8 provides: "The writ of ne exeat shall contain a summons for the defendant to appear in the proper court, and answer the petition or bill."

Section 10 provides that upon the return of the writ duly served, "the court shall proceed therein as in other cases in chancery.***."

It would appear that if it was the intention of the legislature to grant jurisdiction to the law courts, the language used was well designed to conceal such intention. We hold the jurisdiction to issue the writ of ne exeat under this statute is vested solely in the courts of chancery.

We think, too, that this statute cannot be construed as granting to the court power to issue the writ in support of a purely legal claim for unliquidated damages in an action of tort for negligence, such as it appears was brought in this case. The case in aid of which the statute states the writ may issue is one for a "debt or demand." The debt or demand does not necessarily have to be due, but it must exist fairly and bona fide in expectancy at the time of making the application. It does not have to be a debt or demand which is purely of an equitable character, such as, for example, a demand for alimony, and it does not have to be a demand that is cognizable only in a court of equity; that is, it may for example be a demand for account in which courts of equity and courts of law would have concurrent jurisdiction. A claim in tort for negligence is neither a debt or a demand within the meaning of this statute. It cannot be said to be "actually due."

The authorities already cited sustain the view that the statute should be strictly construed, and it would seem that the maxim, "Expressio unius exclusio alterius" is applicable. People v.

may order the writ to issue. Section 3 provides: "No writ of ne exeat shall be granted but upon bill or information filed."

Section 4 provides: "The writ of ne exeat shall contain a summons for the defendant to answer [illegible] the petition or bill."

Section 11 provides that upon the return of the writ duly served, "the court shall proceed therein as in other cases in chancery. * * *"

It would appear from this that the intention of the legislature to grant jurisdiction [illegible], and the language used was [illegible] jurisdiction to issue the writ of ne exeat under the statute is vested solely in the courts of chancery.

We think, too, that this statute should be construed as granting to the courts power to issue the writ in support of purely legal claims for [illegible] for negligence, [illegible]. The case in aid of which the statute allows the writ [illegible] is one for a "debt or demand." [illegible] necessarily have to be [illegible] in [illegible] of the kind [illegible] debt [illegible] purely of [illegible] for example, [illegible] damages [illegible] for [illegible] and [illegible] in tort for negligence [illegible] meaning [illegible].

[illegible]

The statute should [illegible] maxim, "expressio unius [illegible]."

City of Chicago, 261 Ill. 16; Sharp v. Sharp, 333 Ill. 267. Applying that rule of construction, we hold that the statute does not authorize a court to issue the writ of ne exeat in aid of an action at law in tort for negligence.

Plaintiff also contends, citing Hill v. Harding, 93 Ill. 77; Sharpe v. Morgan & Co., 144 Ill. 382; Hughes v. Foreman, 78 Ill. App. 460, and Zimmer v. Thompson, 211 Ill. App. 481, that defendant waived his right to appeal by entering into the ne exeat bond and that the writ thereby became functus officio. With the exception of Zimmer v. Thompson, all these cases involve a state of facts where defendants in attachment suits voluntarily gave bonds to secure a release of the property attached. The Zimmer case held in substance that the surety on a ne exeat bond, which had been given in a separate maintenance proceeding, could not when sued on that bond defend on the ground that the petition on which the writ issued in the original proceeding was insufficient for the reason that this would amount to permitting a collateral attack. The attack here is direct, and for this reason the Zimmer case is not applicable. Moreover, here the jurisdiction of the court itself is directly attacked, while jurisdiction in the Zimmer case case seems to have been conceded.

Section 15 of the Attachment act (Smith-Hurd's Ill. Rev. Stat. 1929, pp. 172-3) expressly provides that when any defendant in attachment gives bond, "the attachment shall be dissolved, and the property taken restored, and all previous proceedings, either against the sheriff or against the garnishees, set aside, and the cause shall proceed as if the defendant had been seasonably served with a writ of summons." There is no such provision in the Ne Exeat act, and therefore these cases relied on are not in point. Moreover, section 11 of the Ne Exeat act expressly provides:

City of Chicago, 221 Ill. 16; Burke v. Sheen, 325 Ill. 327. Applying that rule of construction, we hold that the execute does not authorize a court to issue the writ of ne exeat in aid of an action at law in tort for negligence.

Plaintiff also contends, citing Gill v. Hartigan, 58 Ill. 77; Sharpe v. Kuykendall & Co., 144 Ill. 386; Hughes v. Horton, 78 Ill. App. 480, and Kimmer v. Thompson, 211 Ill. App. 422, that defendants waived his right to appeal by entering into the ne exeat bond and that the writ thereby became "lawfully outstanding." With the exception of Kimmer v. Thompson, all these cases involve a state of facts where defendants in attachment suits voluntarily gave bonds to secure a release of the property attached. The Kimmer case held in substance that the surety on a ne exeat bond, which had been given in a separate misfeasance proceeding, could not avoid on that bond defaults in the original proceeding, the petition on which the writ issued in the original proceeding was insufficient for the reason that the writ would amount to punishing a collateral action. The attack here is direct, and for this reason the Kimmer case is not applicable. Moreover, here the jurisdiction of the court itself is directly attacked, while jurisdiction in the Kimmer case came among to have been conceded.

Section 11 of the [illegible] act (Ill. Rev. Stat. 1957, p. 127-3) [illegible] provides that [illegible] defendants in attachment [illegible] the entire [illegible] solved, and the property [illegible] in [illegible] time, either against the security or against the principals, set aside, and the same [illegible] as [illegible] generally served with a writ of [illegible]." [illegible] violation in the instant act, [illegible] are not in point. However, section 11 of the [illegible] act expressly provides:

"Nothing contained in the preceding section shall prevent the court from proceeding at any time to determine whether the writ ought not to be quashed or set aside."

The purpose for which plaintiff sought this writ is one very far removed from the purpose for which it was originally granted. Anciently, the purpose of the writ seems to have been to prevent a defendant from leaving his home and going outside the jurisdiction in which he resided. The purpose of this writ seems to be to compel defendant not to return to the jurisdiction in which he resides, but to remain in another and different jurisdiction. The practice of issuing writs such as this against interstate travellers is one, we think, which the courts should not approve or tolerate.

Defendant's motion to quash the writ should have been granted, and for the error of the court in this respect the judgment is reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.

"Nothing contained in the preceding section shall prevent the court from proceeding at any time to determine whether the writ ought not to be granted or not."

The purpose for which Section 7 [illegible] was enacted was one very far removed from the purpose for which it was originally granted. Anciently, the purpose of the writ [illegible] was to prevent a [illegible] from leaving the land and going [illegible] the jurisdiction in which he resided. The purpose of this writ seems to be to compel [illegible] not to reside in the jurisdiction in which he resides, but to reside in [illegible] different jurisdictions. The practice of issuing writs over the [illegible] interstate travel are in one, we think, which [illegible] prove or [illegible].

Defendant's motion to quash the writ should not be granted, and for [illegible] the court in this respect the judgment is reversed.

"[illegible]".

Rehearing, [illegible], [illegible], [illegible].

33718

THE FAIR, a Corporation,
Appellee,

vs.

THE ESTATE STOVE COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

255 Ill. 637

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages alleged to have been sustained by it by reason of the alleged breach of a contract entered into between the parties. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for $4049.5[illegible], and the defendant appeals.

The judgment in this case was entered on the second trial. On the first trial the trial court held that the contract on which the suit is based was void for want of consideration. On appeal to this court the judgment was reversed and the cause remanded. The Fair v. Estate Stove Co., 246 Ill. App. 558. On this appeal counsel for the defendant argue at great length that the contract is void, but that question was settled on the former appeal adversely to the defendant's contention.

The record discloses that plaintiff was conducting a retail department store in Chicago and that the defendant corporation manufactured stoves which they designated Estate Heatrolas, and was desirous of having the plaintiff sell them. The contract entered into between the parties provided inter alia that defendant, through its outside salesmen, would obtain orders for the sale of 120 Heatrolas, the sales to be made in the name of plaintiff. A cash payment was to be received for part of the purchase price and the balance was to be evidenced by notes of the purchasers.

33713

THE FAIR, a Corporation,
Appellee,

vs.

THE ESTATE STORE COMPANY,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages alleged to have been sustained by it by reason of the alleged breach of a contract entered into between the parties. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for $4649.0 , and the defendant appeals.

The judgment in this case was entered on the second trial. On the first trial the trial court held that the contract on which the suit is based was void for want of consideration. On appeal to this court the judgment was reversed and the cause remanded. The Fair v. Estate Store Co., 240 Ill. App. 222. On this second trial counsel for the defendant argued at length that the contract is void, but that question was settled on the former appeal adversely to the defendant's contention.

The record discloses that plaintiff was selling a retail department store in Chicago and that the defendant corporation manufactured stoves which they designed [illegible], and was desirous of having the plaintiff sell them. The parties entered into negotiations for a contract [illegible] Tandy, [illegible] the [illegible] of the [illegible] plaintiff. A oral agreement was [illegible] [illegible] purchase price but the [illegible] [illegible] the purchasers.

The evidence shows that the parties proceeded to carry out the contract and defendant's employes solicited and obtained 31 orders for 34 Heatrolas. Three of these orders for six Heatrolas were rejected by plaintiff on the ground that the parties entering into the purchase contracts were not entitled to receive credit. Orders for two other Heatrolas were cancelled by the purchasers, so there were but 26 Heatrolas sold under the contract. The defendant failed and refused to procure any other orders and there is no explanation in the evidence as to the cause of the failure.

No complaint, so far as the evidence shows, was made to the refusal of the plaintiff to accept the three orders nor to the cancellation of the two orders; but on the contrary defendant secured several other orders after plaintiff had rejected the three orders, and these were accepted by the plaintiff. So it is apparent that defendant did not consider the action of plaintiff as a default on its part.

No complaint is made as to the amount of the judgment, the only contentions urged for reversal being that the contract was void for want of consideration and that "The evidence failed to show that the plaintiff acted reasonably and in good faith in rejecting and refusing to accept the three orders for six Estate Heatrolas, submitted to the plaintiff by the defendant for acceptance and rejected by plaintiff."

The first contention we disposed of adversely to defendant on the former appeal. In that appeal it was contended that the contract was void because plaintiff could arbitrarily reject all orders for the Heatrolas which the defendant obtained. We disagreed with this contention and in disposing of it said (page 560): "We are, however, unable to agree with defendant's contention, but are of the opinion that the meaning of the contract

is that the plaintiff would not be warranted in rejecting an order tendered by the defendant unless it acted reasonably and in good faith;" that "The credit department must act reasonably in passing upon the credit of the person executing the order, and that it has no right to arbitrarily refuse to accept orders."

The evidence offered on behalf of plaintiff (the defendant offered none in the case) was to the effect that the manager of the credit department, when orders obtained by defendant were submitted to him, investigated the proposed purchasers to ascertain whether they were worthy of credit in purchasing the Heatrolas; that letters were sent out and investigation made of each person entering into the contract, and that after all of this information had been gathered by defendant's credit manager, the orders were accepted or rejected, the only question considered being as to whether such person or persons were entitled to credit and would probably carry out their contracts; that orders for 26 Heatrolas were accepted, three orders for 6 Heatrolas rejected and two orders for 2 Heatrolas cancelled by the persons entering into them.

Counsel for the defendant contend that, since the plaintiff failed to produce the evidence on which its credit manager acted in rejecting the orders, it cannot be told whether the credit manager acted reasonably and in good faith or arbitrarily. We think this contention is not warranted by the evidence in the record. The evidence shows that a thorough search had been made by plaintiff for any written evidence upon which the credit manager acted and that most of it had been discarded and could not be found. We think the evidence offered by the plaintiff was sufficient to warrant the court in finding, as it did, that the plaintiff acted reasonably and in good faith in rejecting the orders; in fact, there is no contention that the action of the

is that the plaintiff could not be surprised in [illegible] order tendered by the internal notes it [illegible] reasonably and in good faith; that "the credit department [illegible] certainly in making upon the credit of the person executing the order, and [illegible] no right to arbitrarily refuse to accept orders."

The evidence offered on behalf of plaintiff [illegible] defendant offered none in the case; was to the effect that the manager of the credit department, when orders obtained by defendant were submitted to him, invariably [illegible] the proposed purchasers [illegible] ascertain whether they were worthy of credit in [illegible]. The testimony that letters were sent out and investigation made of each person matching this description, [illegible] information had come [illegible] information's credit man, the orders were accepted or rejected. The most question considered being as to whether such [illegible] of [illegible] may would probably carry out their contract; [illegible] testimony were received, there [illegible] a [illegible] and two orders for [illegible] [illegible] him.

[illegible] plaintiff [illegible] manager acted [illegible] the credit [illegible] arbitrarily. [illegible] denied in [illegible]. The evidence [illegible] been made by [illegible] credit manager acted [illegible] could not in good. [illegible] was sufficient to warrant [illegible] plaintiff acted reasonably [illegible] orders; in fact, there [illegible]

credit manager was not in good faith in every particular. The evidence is that he passed upon the credit of the parties entering into the orders for Heatrolas the same as he did on every other person applying to the Fair for credit. In the absence of any countervailing evidence tending to show that the action of the credit manager in rejecting the orders was not made in good faith, we think the court was entirely warranted in entering the judgment in plaintiff's favor.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

credit manager was not in good faith in every particular. The evidence is that on pressed upon the credit of the parties leading into the orders for materials the same as did of every other person applying to the firm for credit. In the absence of any countervailing evidence tending to show the action of the credit manager in refusing the orders was not made in good faith, so much the court was clearly warranted in entering the judgment in plaintiff's favor.

The judgment of the superior court of King county is affirmed.

Affirmed.

Rudkin, C. J., and Ketcham, J., concur.

33752

STANLEY PIPAL,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

25 [illegible] 037

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, basing his claim upon the Federal Employers Liability act, brought suit against the defendant to recover damages for personal injuries sustained by him through the alleged negligence of the defendant. There was a jury trial and a verdict and judgment in his favor for $40,000, and the defendant appeals.

The record discloses that on August 7, 1928, plaintiff, a section-hand employed by defendant, was helping unload steel rails from a car located at about 139th street, in Cook County, Illinois. Two section gangs were unloading the rails and placing them near the railroad tracks on cross-ties over a ditch. Plaintiff was standing on the pile of rails engaged at his work when one of the cross ties under the rails gave way, causing the rails to fall and severely injuring him.

The defendant contends that the Federal Employers Liability act does not apply, but that plaintiff was entitled to receive compensation as provided in the Workmen's Compensation act of this State, the argument being that at the time plaintiff was injured he was not engaged in interstate commerce.

In passing on the meaning of the Federal Liability act where the question was similar to the one here involved, the United States Supreme Court in Chicago, Burlington & Quincy Railroad Co. v. Harrington, 241 U. S. 177, said (p. 180):

"As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employe at the time of the injury engaged

in interstate transportation or in work so closely related to it as to be practically a part of it.'"

The same rule has been announced a number of times by our Supreme Court. Kusturin v. C. & A. R.R.Co., 287 Ill. 306. The question therefore is: Was plaintiff at the time of his injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?

The evidence shows that on August 4, 1928, two cars of railroad rails belonging to the defendant were transported from Durand, Michigan, consigned to defendant's track superintendent, J. Nolan, at Blue Island, Illinois. One of the cars was a Rutland car and the other a Grand Trunk car. Nolan knew before their arrival, which was about four o'clock on the morning of August 6, that the rails were coming. He gave orders that the cars be placed at 139th street and told the foreman to unload the rails as close as possible to 139th street, which is at Blue Island, as this was the only convenient place where he could get them out afterwards if he wanted them. When the cars arrived they were placed on "hold track number two," which was about 600 feet south of the Grand Trunk station, Blue Island. After the cars arrived and during the day of August 6th, the yardmaster, in switching in the yard, moved the two cars two or three times. The next day, August 7th, the yardmaster ordered the cars delivered to 139th street, a distance of about one-half mile, where they were unloaded. Two section gangs, of one of which plaintiff was a member, were sent to unload the rails. They unloaded the Grand Trunk car and then proceeded to unload the Rutland car. Cross-ties were placed across a ditch near the side of the railroad track on which the rails were being placed. Plaintiff was standing on the pile of rails in the discharge of his duty when the rails collapsed on account of the breaking of the ties underneath. Both his legs were severely injured.

The defendant contends that when the cars were placed

in interstate transportation or is so far as closely related to it as to be practically a part of it."

The same rule has been announced a number of times by our Supreme Court. Shafer v. [illegible], 267 U.S. [illegible]. The question therefore is: Was employed at the time of his injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?

The evidence shows that on March 4, 1920, two cars of railroad rails belonging to the defendant were transported from Detroit, Michigan, consigned to defendant's track and yard, 1. Rolls, in Blue Island, Illinois. One of the cars was a flatbed car and the other a steel frame car. Rolls knew little about rails, which was about four o'clock on the morning of August 3, that the rails were coming. He gave orders that the cars be placed at 130th street and told the foreman to unload the rails as close as possible to 130th street, which is also known, as this was the only convenient place where a crane and other equipment could be used to unload. When the cars arrived they were placed on their track number two, which was about two [illegible] of the usual unloading station, Ninth Island. After the cars arrived and during the day of August 6th, the yard master, in unloading in the yard, moved the two cars two or three times. [illegible] the yard master ordered the cars [illegible] a distance of about one-half mile, where [illegible]. The station yard, of one of which plaintiff [illegible], were [illegible] rails. They unloaded the steel frame car and then proceeded to unload the flatbed car. Steam-line ran diagonally across a ditch near the side of the railroad track on which the rails were being placed. Plaintiff was standing on the side of [illegible] in the [illegible] duty when the rails collapsed [illegible] the [illegible] the water underneath. Both his legs were severely injured.

on number 2 hold track on the morning of August 6th, the interstate phase of the work was ended, and that what was done that day in moving the cars about and afterwards placing them near 139th street, and plaintiff's work in unloading the rails on the 7th, was intrastate work and that therefore there is no liability. In support of this the cases of C. B. & Q. R.R.Co. v. Harrington, 241 U.S. 177; Lehigh Valley R. R. Co. v. Barlow, 244 U.S. 183, and other cases are cited. We think it would serve no useful purpose to analyze the numerous authorities cited by each side, for we are of the opinion that all the evidence shows that the cars in question had not reached the point of destination until they were placed near 139th street on August 7th. The testimony of defendant's track supervisor, which we have above referred to, shows that he knew the rails were being transported and gave orders that they be placed as near 139th street as possible where they could be unloaded; and we think that until the cars were "spotted" near 139th street for unloading, they had not reached their destination. Placing them, on the morning of August 6th, about one-half mile distant on hold track number 2, was a temporary stop. The unloading of an interstate shipment has been held to be so closely related to interstate transportation as to be a part of it. B. & O. S. W. R.R. Co. v. Burtsch, 263 U. S. 540. So we think plaintiff came under the Federal act.

Moreover, there is evidence in the record to the effect that the defendant was having the rails unloaded at 139th street so that in case it thereafter determined to use them they would be accessible; that about two months afterwards some of the rails were used in the repair of the tracks in the vicinity of 139th street. The defendant contends that since there was an intervening movement between the unloading of the rails and their use in the construction of the tracks, the unloading of them was

on number 2 hold track on the morning of August 6th, the interstate phase of the work was ended, and that what was done that day in moving the cars about and afterwards shoving them near 130th street, and plaintiff's work in unloading the rails on the 7th, was intrastate work and that therefore there is no liability. In support of this the cases of C. F. & I. R.R.Co. v. Harrington, 241 U.S. 177; Lehigh Valley R. R. Co. v. Kepner, 244 U.S. 185, and other cases are cited. We think it would serve no useful purpose to analyze the numerous authorities cited by each side, for we are of the opinion that all the evidence shows that the cars in question had not reached the point of destination until they were placed near 130th street on August 7th. The testimony of defendant's track superintendent, which we have before referred to, shows that he knew the rails were being transported and gave orders that they be placed as near 130th street as possible where they could be unloaded; and we think that until the cars were "spotted" near 130th street for unloading, they had not reached their destination. Finding them, on the morning of August 6th, about one-half mile distant on hold track number 2, was a temporary stop. The unloading of an interstate shipment has been held to be so closely related to interstate transportation as to be a part of it. B.& O.R.R.Co. v. Commr. of Parkers, 265 U. S. 540. So we think plaintiff came under the federal act.

Moreover, there is evidence in the record to the effect that the defendant was having the rails unloaded at 130th street so that in case it thereafter determined to use them they would be accessible; that about two months afterwards some of the rails were used in the repair of the tracks in the vicinity of 130th street. The defendant concedes that since there was an intervening movement between the unloading of the rails and their use in the construction of the tracks, the unloading of them was

not of an interstate character. On the other hand, there was evidence tending to prove that the rails in question were shipped from Durand, Michigan, to Blue Island, Illinois, by the defendant to be used by it in the repair and maintenance of its tracks. At least reasonable minds might reasonably draw such inference from the facts in evidence and therefore the question whether plaintiff was engaged in interstate work within the meaning of the Federal act was for the jury to decide.

A further point is made that the plaintiff assumed the risk and therefore the defendant is not liable. In support of this contention it is argued that plaintiff and two of his witnesses who were working with him at the time, testified that there were two complaints made concerning the dangerous condition of the ties on which they were piling the rails - one about ten o'clock in the morning and the second about two o'clock in the afternoon on the day of the accident, and that on each of these occasions the foreman of one of the section gangs engaged in the work ordered that additional ties be brought to eliminate the danger; that plaintiff therefore knew of the dangerous condition because he helped build the foundation under the rails, and having continued to work he assumed the risk. There was other evidence to the effect that the defendant's foreman ordered and directed the men to continue the work after his attention had been called to the condition of the crossties, and assured the men they could proceed with safety. In Slack v. Harris, 200 Ill. 96, it is said (p. 109):

> "Again, a master is liable to a servant, when he orders the latter to perform a dangerous work, unless the danger is so imminent that no man of ordinary prudence would incur it. Here, the appellee received orders from the engineer under whose control and direction he was placed by the appellant, as to how he should operate the elevator****.
>
> "Even where a servant has some knowledge of attendant danger, his right of recovery will not be defeated, if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances.****
>
> "The question, however, whether the risk incurred by the appellee was one of the usual and ordinary incidents of his

not of an intoxicable character. On the [illegible] 6, there was evidence tending to prove that [illegible] in [illegible] were [illegible] from Detroit, Michigan, to Blue Island, Illinois, [illegible] to be used by it in the regular [illegible] of the [illegible] least reasonable minds might reasonably draw such inferences from the facts in evidence and therefore the question [illegible] was engaged in interstate [illegible] was for the jury to decide.

A further point is [illegible] trial and therefore the referee is not liable. [illegible] contention it is [illegible] were working with [illegible] company, [illegible] complaints made concerning [illegible] which they were doing, [illegible] morning [illegible] day of the accident, [illegible] of the [illegible] transit time be [illegible] to [illegible] the transportation [illegible] appeared [illegible] defendant's [illegible] after the [illegible] time, [illegible] Williams. [illegible] "Again, a motion is [illegible] letter to [illegible] minent that no [illegible] the complaint [illegible] trial of [illegible] should [illegible] "[illegible] ner, the right of [illegible] the owner, [illegible] ity proceed [illegible]

"The question, [illegible] negligence was one of [illegible]

> employment, was left by the instructions to the jury; and, as it is a question of fact, *** It is a proper question to be left to the jury, under all the evidence, whether the risk is assumed, or not."

In the instant case the question whether plaintiff had assumed the risk was submitted to the jury by instructions given at defendant's request. By its verdict the jury found against the defendant, and upon a careful consideration of all the evidence we are unable to say that the finding is against the manifest weight of the evidence. In these circumstances, we are not warranted in disturbing the verdict of the jury.

The defendant further contends that the verdict and judgment should be set aside because the jury was misled by the inflammatory language of counsel for the plaintiff which biased and prejudiced the jury; that the verdict is "beyond all reason in amount;" that, in the selection of the jury, counsel for the plaintiff evolved a plan to obtain an enormous verdict; that plaintiff asked prospective jurors whether in case they found for the plaintiff they would give him "full compensation and full measure of damages;" whether, in case he were selected, and found in favor of plaintiff, he would "adequately and fully compensate plaintiff for his injuries;" that this erroneous examination was strengthened by plaintiff's counsel in his argument to the jury where he referred to plaintiff's "terrible loss" and told the jury that plaintiff was entitled to recover his full measure of damages, that plaintiff was "a hopeless cripple."

The court sustained objections to some of the questions propounded to the prospective jurors and they were instructed that in case they found for the plaintiff they would fix the damages at such sum as the jury found would be fair and just compensation for the injuries sustained. Other complaints are made as to remarks made by counsel for plaintiff in his argument to the jury, which we think it unnecessary to mention here because after a

careful consideration of the question involved we have reached the conclusion that we would not be warranted in disturbing the judgment on account of the questions propounded to the prospective jurors or the argument of counsel.

Is the verdict so excessive as to warrant interference on our part?

At the time plaintiff was injured he was 32 years old; he was born and raised on a farm and had been engaged in farming up to a few months before the accident. Prior to the accident he was in good health and had never received any serious injury. After the accident he was confined to hospitals for more than five months. Both of his legs were severely injured; they were crushed and both became infected. On August 29th the left leg was amputated between the knee and ankle; before this was done the surgeon had operated on or lanced it about ten times; after the amputation it was necessary for the surgeon to make an incision in the stump of the leg because there was pus. The right leg was operated upon and lanced daily for eight or nine days and when he left the hospital the leg was swollen and discharging pus. X-ray pictures of the right leg show that the foot and ankle are firmly fixed, ankylosed, and incapable of movement either in ankle or tarsal joint. The plaintiff has a turned out, flat foot, fragments of bone are shown protruding from the ankle. The injuries to the right foot and ankle are permanent. Plaintiff was able to be out of his house on crutches three times before the trial, which began April 1, 1929, a period of nearly eight months. He was unable to wear a shoe but was compelled to wear a slipper. Defendant admits that plaintiff has suffered a total permanent disability. By this his counsel say they do not mean to admit that in the future he will be entirely helpless.

Many cases are cited by defendant's counsel tending to show that the verdict is excessive. While a number of authorities

are cited which counsel for the plaintiff contend are to the effect that the amount of the verdict is warranted by the evidence, we think it would serve no useful purpose to analyze these cases. The amount of damages in cases of this character depends upon the circumstances of the case and is not a matter of mathematical computation. Plaintiff was 32 years old, in good health, and at the time of the accident was earning about $1,000 a year. He testified that during all his life and until a few months before the accident he worked on a farm where he earned more than on the railroad. He has been totally and permanently disabled. A consideration of the evidence as to the nature and character of his injuries and the treatment he received by the surgeons proves beyond question that his pain and suffering were very great, and of course this is, under the law, an element of damages. While the amount of the judgment is large, yet we are unable to say, after a careful consideration of all the evidence, that it is so excessive as to require interference on our part.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

are cited which counsel for the plaintiff argued are to the effect that the amount of the verdict is unsupported by the evidence, we think it would serve no useful purpose to analyze these cases. The amount of damages in cases of this character depends upon the circumstances of the case and is not a matter of mathematical computation. Plaintiff was 37 years old, in good health, and at the time of the accident was earning about $[illegible] a year. He testified that during all his life and until a few months before the accident he worked on a farm where he earned some [illegible] a year. He was born totally and permanently disabled. A comparison of the evidence in the matter of the character of his injuries and the pain he is required by the medical proof to endure leaves no doubt that the pain and suffering are very great, and of course this is, under the circumstances of the case. While the amount of the judgment is large, yet we are unable to say, after a careful consideration of all the evidence, that it is so excessive as to require interference on our part.

The judgment of the Supreme Court of [illegible] is affirmed.

AFFIRMED.

Kennedy, C. J., and [illegible], J., concur.

33781

SARAH SCHMIDT, administratrix of the estate of Herman Schmidt,
Appellee,

v.

HERMAN ROCKLIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

255 I.A. 638

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff caused judgment to be entered by confession on a lease in her favor and against the defendant for $725 which included $50 attorney's fees. The rent claimed was $75 a month for the months of September, 1927, to May, 1928, both inclusive. The defendant filed an affidavit and moved that the judgment be opened up and that he be given leave to defend, which was accordingly done. The affidavit stood as an affidavit of merits. The case was then heard before the court and there was a finding and judgment in plaintiff's favor of $575, and the defendant appeals.

It appears from the evidence that defendant paid all rent while he occupied the premises. Evidence was offered tending to show that he had vacated the premises at plaintiff's request, although this was denied by plaintiff. It further appears that shortly after defendant vacated the premises, plaintiff found another tenant who apparently entered into a lease and occupied the premises for a time; that plaintiff obtained from this tenant $150 which the court allowed as a credit upon the judgment.

One of the defenses interposed was that the place was let to the defendant by the plaintiff to be used for gambling - taking bets on horse racing. Plaintiff offered evidence to the effect that she had no knowledge of the purpose for which the premises

33781

SARAH ROCKLIN, administratrix
of the estate of Harman Rocklin,
Appellee,

v.

HARMAN ROCKLIN,
Appellant.

FIRST DIVISION CRIMINAL
COURT OF APPEALS
JUNE 1, 1938

MR. JUSTICE O'CONNOR DELIVERS THE OPINION OF THE COURT:

Plaintiff caused judgment to be entered by default on a lease in her favor and against the defendant for $725 (she included $50 attorney's fees. The rent claimed was $75 a month for the months of September, 1937, to May, 1938, both inclusive. The defendant filed an affidavit and moved that the judgment be opened up and that he be given leave to defend, which was accordingly done. The affidavit stood in an affidavit of merits. The case was then heard before the court and there was a finding and judgment in plaintiff's favor of $575, and the defendant appeals.

It appears from the evidence that defendant paid all rent while he occupied the premises. Evidence was offered tending to show that he had vacated the premises at plaintiff's request, although this was denied by plaintiff. It further appears that shortly after defendant vacated the premises, plaintiff found another tenant who apparently entered into a lease and occupied the premises for a time; that plaintiff obtained from this tenant $150 which the court allowed as a credit upon the judgment.

One of the defenses interposed was that the premises not to the defendant by the plaintiff to be used for gambling - taking bets on horse racing. Plaintiff offered evidence to the effect that she had no knowledge of the purpose for which the premises

were to be used, while evidence was offered on the other side to the contrary. No brief has been filed on behalf of the plaintiff in this court.

The defendant urges a number of points in his brief to sustain his contention that the judgment should be reversed, but in the view we take of the case, we think it will be necessary to consider but one of them.

The lease involved is between Herman Schmidt, lessor, and the defendant and another as lessees. It is the ordinary printed form of lease but in the space left blank for the purpose of writing in the property demised, it is described as "Store & basement to be occupied for Smoke shop and Cigar Store." There is no further description of the location of the premises. The lease is signed by the lessees and by "Herman Schmidt Estate, by Sarah Schmidt, Administratrix," and the point made by the defendant is that the lease is void. That he can raise this question since he has vacated the premises and is not occupying them under the alleged lease.

The evidence shows that Herman Schmidt apparently owned the premises in question and that he died prior to the making of the lease; that plaintiff was his daughter and had been appointed administratrix of the estate, and that Herman Schmidt left other heirs, who, together with the plaintiff would inherit the property. Under the law in this state, the administratrix has no authority to take charge of and rent the real estate belonging to the estate. The lease having described Herman Schmidt as the landlord and he having died prior to the making of the lease, and the document having been signed by his administratrix we think renders the alleged lease void and of no effect. We think we ought to say that the point was not raised in the trial court but the contention being that the lease was void on its face, we think can be raised for the

were to be used, while evidence was offered on the other side to the contrary. No brief has been filed on behalf of the plaintiff in this court.

The defendant urges a number of points in his brief to sustain his contention that the judgment should be reversed; but in the view we take of the case, we think it will be necessary to consider but one of them.

The lease involved is between Herman Schmidt, lessor, and the defendant and another as lessees. It is the ordinary printed form of lease but in the space left blank for the purpose of writing in the property demised, it is described as "Store & basement to be occupied for Smoke shop and Cigar store." There is no further description of the location of the premises. The lease is signed by the lessees and by "Herman Schmidt Estate, by Sarah Schmidt, Administratrix," and the point made by the defendant is that the lease is void. That he can raise this question since he has vacated the premises and is not occupying them under the alleged lease.

The evidence shows that Herman Schmidt apparently owned the premises in question and it is clear prior to the making of the lease; that plaintiff was his daughter and has been appointed administratrix of the estate, and that Herman Schmidt left other heirs, who, together with the plaintiff could inherit the property. Under the law in this state, the administratrix has no authority to take charge of and rent the real estate belonging to the estate. The lease having described Herman Schmidt as the landlord and it having died prior to the making of the lease, and the instrument having been signed by his administratrix we think renders the alleged lease void and of no effect. We think we ought to say that the point was not raised in the trial court but the contention being that the lease was void on its face, we think can be raised for the

first time in this court.

In view of our holding that the lease was void, the judgment must be reversed. But since there can be no recovery under the lease, the cause will not be remanded. The judgment of the Municipal court of Chicago is reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

first time in this court.

In view of the holding that the lower court, the judgment must be reversed. The cause then be remanded to the lower, the court will run be remanded. The costs of the municipal court of this pa is assessed.

So ordered. J. J., and Dalton, J., concur.

33799

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Appellant,

vs.

ROBERTS & SCHAEFER COMPANY, a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to reverse a judgment of the Circuit court of Cook county, entered on the verdict of a jury finding the defendant not guilty. The record discloses that plaintiff brought suit against the defendant to recover $17,500 which it had paid to one of its firemen on account of injuries he sustained through the alleged negligence of the defendant in the construction of a sanding plant for plaintiff at Conemaugh, Pennsylvania. This is the second trial of the case. On the first trial there was also a verdict and judgment in the defendant's favor, which on appeal to this court was reversed, principally on the ground of faulty instructions. Pennsylvania Company v. Roberts & Schaefer Company, 250 Ill. App. 330.

A statement of the facts will be found in the opinion of this court on the former appeal, so that it will be unnecessary to state them at large here. It will be sufficient to say that the evidence discloses that the defendant had constructed a sanding plant for plaintiff for sanding plaintiff's locomotives; that the plant has been substantially completed a week or two prior to February 7, 1924, the date of the accident; that defendant had requested plaintiff to use the plant in sanding its locomotives before it was finally completed and turned over to plaintiff; that plaintiff proceeded to do this and had been using the plant for sanding its locomotives for about two weeks or ten days prior to

55T03

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Appellant,

vs.

ROBERTS & SCHAEFER COMPANY, a Corporation,
Appellee.

[illegible]

[illegible]

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION [illegible]

By this appeal plaintiff seeks to reverse a judgment of the Circuit Court of Cook County, entered on the verdict of a jury finding the defendant not guilty. The record discloses that plaintiff brought suit against the defendant to recover $12,000 which it had paid to one of its employees on account of injuries he sustained through the alleged negligence of the defendant in the construction of a warehouse built for plaintiff. At commencement, the plaintiff, [illegible] the first trial there was also a verdict and judgment in the defendant's favor, which on appeal to this court was reversed, [illegible] on the ground of faulty instructions. [illegible] Roberts & Schaefer Company, 256 Ill. App. 44.

A [illegible] the facts [illegible] the opinion of this court on the former appeal, [illegible] it is unnecessary to state them at large here. It will be sufficient to say that the evidence discloses that the defendant had erected a warehouse plant for a subsidiary for the long plaintiff's [illegible] that the plant has been [illegible] February 7, 1918, the date of the accident [illegible] respected plaintiff's [illegible] before it was finally completed [illegible] plaintiff proceeded to make [illegible] sending its locomotives [illegible]

February 7th. About nine o'clock in the evening of that day an employe of plaintiff was endeavoring to sand a locomotive by operating the sanding plant but he was unable to open the valve which let the sand from the plant into the locomotive and called upon another of plaintiff's employes to assist him. They were on top of the locomotive pulling the lever which opened the valve, when a weight weighing about 32 pounds attached to an arm by means of a set screw and suspended about 24 feet above the ground, slipped off the arm and struck plaintiff's fireman who was coming to take the locomotive on a regular trip and he was very severely injured. Afterwards he brought suit against the plaintiff which plaintiff settled with the fireman by paying him $17,500.

The plant was not turned over by the defendant to plaintiff and accepted by the latter until about March 1st, which was about three weeks after the accident. The evidence also shows that when plaintiff's two employes were endeavoring to sand the locomotive they pulled the lever hard a number of times in an endeavor to open the valve, and at the time a key or bolt, which fastened the lever on which the counter weight was attached, was severed or sheared off, allowing the lever or arm to fall downward.

Plaintiff's theory of the case was that the counter weight was insecurely fastened to the arm by means of the set screw - that the screw was too short. While the defendant's theory was that the counter weight was properly and securely attached to the arm and that the accident was brought about through the rough usage by plaintiff's employes, and that such usage caused the key which fastened the lever to shear off, thereby letting the lever fall downward, which was a contributing cause to the accident. A witness for plaintiff testified that the manner in which the counter weight was secured to the arm, by means of the set screw, was a common and accepted method of construction.

February 7th. About nine o'clock in the evening of that day an employe of plaintiff was endeavoring to send a locomotive by operating the sanding plant but he was unable to open the valve which let the sand from the plant into the locomotive and called upon another of plaintiff's employes to assist him. They were on top of the locomotive pulling the lever which opened the valve, when a weight weighing about 32 pounds attached to an arm by means of a set screw and suspended about 24 feet above the ground, slipped off the arm and struck plaintiff's fireman who was coming to take the locomotive on a regular trip and he was very severely injured. Afterwards he brought suit against the plaintiff which plaintiff settled with the fireman by paying him [illegible].

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Plaintiff's theory of the case was [illegible] weight was improperly fastened to the arm by means of a set screw - that the screw was too short. While the evidence [illegible] was that the counter weight was properly and [illegible] the arm and that the bolt was broken [illegible] through the usage by plaintiff's employes, [illegible] which fastened the lever to which [illegible] fall downward, which was a [illegible] witness for plaintiff testified that the [illegible] weight was secured to the arm, by means of the [illegible] a common and accepted method of construction.

The jury apparently took the defendant's theory of the case and found in its favor. They were told in an instruction requested by plaintiff that it was the duty of the defendant to exercise ordinary care to so construct and maintain the plant that the counter weight would not fall down, so that plaintiff's employes, who were in the exercise of ordinary care for their own safety, might not be injured. And at the request of the defendant the jury were instructed that unless they believed from the evidence that plaintiff had proved by its greater weight that the injuries sustained by the fireman were caused by the negligence of the defendant as charged in the declaration, then they should find the defendant not guilty.

The charge in the declaration was that defendant had insecurely fastened the counter weight to the arm. The issue was simple and clearly understandable by the jury. And, upon a careful consideration of all the evidence in the record we are unable to say that the finding in favor of the defendant is against the manifest weight of the evidence. In this holding it obviously follows that the court did not err in refusing to instruct the jury to find for the plaintiff, nor in overruling its motion for a new trial.

Complaint is made by plaintiff to the giving of instructions numbers 9, 10, 13, 14, 15, 16 and 17 at defendant's request. By instruction 9 the jury were told, in effect, that the fact that the fireman was injured and plaintiff had sustained damages on account of such injury, was not of itself sufficient to charge the defendant with liability; that the burden was on the plaintiff to prove the specific negligence charged in its declaration. Complaint against this instruction is that it used the language, "the specific negligence charged in its declaration," but did not tell the jury what negligence was charged in the declaration. On the former

The jury apparently took the defendant's theory of the case and found in its favor. They were told in an instruction requested by plaintiff that it was the duty of the defendant to exercise ordinary care to so construct and maintain the plant that the counter weight would not fall down, so that plaintiff's employee, who was in the exercise of ordinary care for their own safety, might not be injured. And at the request of the defendant the jury were instructed that unless they believed from the evidence that plaintiff had proved by its greater weight that the injuries sustained by the fireman were caused by the negligence of the defendant as charged in the declaration, then they should find the defendant not guilty.

The charge in the declaration was that defendant had negligently fastened the counter weight so it was [illegible] simple and clearly understandable by the jury. [illegible] a careful consideration of all the evidence [illegible] we are unable to say that the finding in favor of the [illegible] was not the manifest weight of the evidence. In this [illegible] obviously follows that the court did not err in refusing [illegible] to find for the plaintiff, nor in refusing [illegible] a new trial.

Complaint is made by [illegible] the giving of certain instructions numbered 8, 10, 12, 13, 14, 24 and 27 on defendant's request. By instruction 8 the jury were told, [illegible] the fireman was injured [illegible] court of such injury, [illegible] defendant with liability [illegible] prove the negligence charged in the declaration [illegible] against this instruction in that [illegible] negligence charged in the [illegible] what negligence was [illegible]

appeal we held this identical instruction not reversibly erroneous, and on the second trial the evidence was not so materially differen t as to render it seriously objectionable. As we have stated, the issue in the case was whether the counter weight was securely attached to the arm. The issue was simple and specific and we are certain the jury was not in any way misled by the instruction. Moreover, instruction number 6 was given at plaintiff's request, and referred the jury to the allegations of the declaration.

By instruction number 10 complained of the jury were told that it was their duty to decide the case from the evidence received in open court; that any evidence offered to which objection was sustained or which was stricken out by the court, should not be considered, and that statements made by counsel for either side, if any, which were unsupported by any evidence, should be disregarded by the jury. It is contended, as stated by counsel, that "the vice of this instruction is that without an objection to argument of counsel the court abdicates and passes the question of relevancy to the fancy of the jury." But we think the instruction is not subject to the objection. It is certain that we would not be warranted in disturbing the judgment in such a case as the one at bar for every little inaccuracy that might appear in an instruction.

Instruction number 13 told the jury that in arriving at their verdict they were not required to set aside their observations and experiences as men, but that they had the right, upon a consideration of all the evidence, together with their experience and observation, to say "where the truth lies upon any material fact in the case." It is contended that the instruction authorizes the jury to consider all the evidence in connection with their experience as men and based upon such consideration, to determine any material fact in the case. And a number of authorities are cited where it is held such an instruction was erroneous on the question

appeal we held this identical instruction not reversibly erroneous, and on the second trial the evidence was not so conclusively different as to render it seriously objectionable. As we have stated, the issue in the case was whether the counter weight was securely attached to the arm. The issue was simple and specific and we are certain the jury was not in any way misled by the instruction. Moreover, instruction number 6 was given at plaintiff's request, and referred the jury to the allegation of the declaration.

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Instruction number 12 told the jury that in arriving at their verdict they were not required to set aside their observations and experiences as men, but that they had a right, upon a consideration of all the evidence, large but [illegible] and observation, to say "where the truth lies upon any material fact in the case." It is contended that the instruction authorizes the jury to consider all the evidence in consideration of their own experience as men and based upon such consideration, to decide any material fact in the case. And a number of authorities are cited where it is held that an instruction was erroneous in the question

of damages where there was specific proof of certain items of damages. We think these cases are not in point. The question of damages does not arise here since the jury found in favor of the plaintiff. We are of the opinion that the instruction did not prejudicially affect plaintiff's rights. As stated, the specific point in controversy was, whether the counter weight was securely fastened, and we think it clear that the jury understood that this was the material point in the case.

By instruction 14 the jury were told that in making up their verdict the first thing for them to determine was whether or not there was any liability on the part of the defendant to compensate the plaintiff, and the fact that plaintiff had paid its fireman for the injuries he had sustained "is not alone an element to be considered by the jury in determining whether or not there is liability" on the part of plaintiff; and that if after considering all the evidence the jury believed the defendant was not liable, then they should return a verdict of not guilty regardless of the nature and extent of the fireman's injuries. Complaint is made that this instruction ignored the issue and authorized the jury to say whether or not there was any liability in the case. We think this contention is not warranted by a reading of the instruction. At any event, we think that, under the evidence in the case, the jury were not misled to the prejudice of plaintiff.

Complaint is made of instruction 15, by which the jury were told that before the plaintiff could recover it must show by a preponderance of the evidence that the accident was proximately caused by the negligence of the defendant and that defendant failed to use such degree of care and caution in the construction of the plant as an ordinary person or persons in like circumstances would use in the construction and erection of the plant; that plaintiff

of damages where there was specific proof of certain items of damages. We think these cases are not in point. The question of damages does not arise here since the jury found in favor of the plaintiff. We are of the opinion that the instruction did not prejudicially affect plaintiff's rights. As stated, the specific point in controversy was, whether the contact points were properly fastened, and we think it is clear that the jury understood this was the material point in the case.

By instruction 14 the jury were told that in making up their verdict the first thing to be taken up was whether or not there was any liability on the part of the defendant to compensate the plaintiff, [illegible] fireman for the injuries [illegible] to be considered by the jury [illegible] liability on the part [illegible] all the evidence [illegible] then they should return a verdict [illegible] nature and extent of [illegible] injuries [illegible] that [illegible] any whether or not [illegible] any liability in the case [illegible] this contention is [illegible] At any event, [illegible] jury were not misled [illegible]

Complaint is made of instruction [illegible] were told that [illegible] circumstances of the evidence [illegible] caused by the negligence [illegible] to use such degree of care [illegible] plant as an ordinary [illegible] and in the consideration [illegible]

must further show by a preponderance of the evidence not only that the fireman was injured as a result of the accident in question, but that it must also show by a preponderance of the evidence the extent of the injuries; and that plaintiff must prove what would be a fair compensation for the damages which the fireman had sustained by reason of his injuries. It is contended that this instruction was wrong because the declaration did not charge the defendant with the failure to exercise ordinary care in the erection of the sand plant, but that the charge was confined to the insecure manner in which the counter weight was attached to the arm. Other instructions were given at the request of plaintiff which told the jury that if they found from the evidence that defendant had "constructed the dock in question," etc. These instructions referred to the construction of the dock and not to the method of securing the counter weight, and are subject to the same objection that plaintiff now urges against instruction number 15. Under a well known rule of law, plaintiff is not in a position to complain of an instruction given by his opponent when instructions offered in his own behalf are subject to the same objection. We are also of the opinion that any inaccuracy in this instruction would not warrant us in disturbing the verdict of the jury under the facts disclosed. They knew that the only objection to the erection of the sanding plant was confined to the fastening of the counter weight to the arm.

Instruction number 16 told the jury that the question for them to decide was whether the defendant was liable "at all" and that it was their duty to determine that question before considering the question of the amount of damages; and that if they determined that the defendant was not liable they would have no occasion to consider the question of damages. It is said this instruction is bad because it did not tell the jury that it was

[illegible]

their duty to determine from a preponderance of the evidence whether the counter weight was insecurely attached to the arm, and that this should have been done; and that the words, "at all" used in the instruction "would impress the jury with its supremacy over the question of liability without regard to the issue." We think the instruction is not subject to the objection made. Obviously, the question of defendant's liability must be established before the question of damages could be taken up. And as stated, the jury clearly understood what the issue was, namely, whether the counter weight was securely attached to the arm.

Instruction number 17 complained of, told the jury that the defendant was not bound to use the highest degree of care possible to avoid injuring the fireman, but it was required to use only reasonable and ordinary care under the instruction, and if the jury believed from the evidence, under the instruction of the court, that defendant did exercise such care, then there should be a verdict for the defendant. The complaint is made against this instruction that it was general and should have been confined to the exercise of ordinary care on behalf of the defendant in fastening the counter weight to the arm, which was the issue in the case. We think the instruction was not erroneous.

Upon a careful consideration of all the evidence in the record, and the instructions to the jury, we are of the opinion that we would not be warranted in saying that the plaintiff did not have a fair trial. The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

their duty to determine [illegible] of the [illegible] the counter weight was inadvertently attached to the car, and that this should have been tested [illegible] "at [illegible] in the instruction "would impose [illegible] the question of liability was not regular in [illegible] the instruction is not subject to the objection [illegible], the question of defendant's liability must [illegible] the question of damages should [illegible] jury disagree [illegible] counter weight was negligently attached to the car.

Instruction number [illegible] was [illegible] that the defendant was [illegible] possible to avoid injuring the [illegible] only in [illegible] the jury [illegible] the court, that [illegible] should be a verdict [illegible] against this instruction [illegible] counsel [illegible] not in [illegible] the court [illegible] in the case. [illegible]

[illegible] record, and the instructions to the jury, [illegible] we would not be satisfied [illegible] a fair trial. The judgment [illegible] affirmed.

McCurdy, C. J., [illegible]

33808

BENJAMIN MOORE & COMPANY,
a corporation,
Appellant,

v.

CASA BONITA BUILDING CORP.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Benjamin Moore & Company, a corporation, as owner of a promissory note for $5,000 made by the defendant, Casa Bonita Building Corporation, caused judgment by confession to be entered on the note in its favor and against the defendant for $5,133.34 which included $25 attorney's fees. This judgment was on motion of the defendant supported by its affidavit, opened up, and it was given leave to defend. It filed its affidavit of merits and during the trial, its amended affidavit of merits. The case was tried before the court without a jury, and there was a finding and judgment in defendant's favor, and plaintiff appeals.

An examination of the evidence in the record discloses that the case was very poorly tried by counsel, the facts were very meagerly brought out, and on the whole, there is such uncertainty that the judgment must be reversed and the cause remanded for a new trial. From the evidence we gather that the defendant was having an apartment building constructed for it by Nathan Finkel the payee in the note, at a cost not to exceed $20,000. This contract appears to have been in writing but it was not produced and we think the court erred in overruling objections to oral evidence as to the contents of the contract. It should have been produced.

BENJAMIN MOORE & COMPANY,
a corporation,
Appellant,

v.

CARA MONITA BUILDING CORP.,
a corporation,
Appellee.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Benjamin Moore & Company, a corporation, as owner of a promissory note for 15,000 made by the defendant, Cara Monita Building Corporation, caused judgment by confession to be entered on the note in its favor and against the defendant for $3,133.44 which included $20 attorney's fees. This judgment was on motion of the defendant supported by its affidavit, opened up, and it was given leave to defend. It filed its affidavit of merits and during the trial, its amended affidavit of merits. The case was tried before the court without a jury, and there was a finding and judgment in defendant's favor, and plaintiff appeals.

An examination of the evidence in the record discloses that the case was very poorly tried by counsel, the issues were very inaccurately brought out, and on the whole, there is much uncertainty that the judgment must be reversed and the cause remanded for a new trial. From the evidence we gather that the defendant was having an apartment building constructed for it by Grimm Inc; the payee in the note, it is not to exceed $40,000. This contract appears to have been in writing but it is not produced and we think the court erred in overruling objections to oral evidence as to the contents of the contract. It should have been produced.

The evidence of the defendant was to the effect that Finkel did not properly complete the building and that therefore it was required to complete it at a cost of more than $2,800, but we think the evidence as to this additional cost was very uncertain and indefinite. There was further evidence offered on behalf of the defendant that it had paid this note, and five specific dates are mentioned in the testimony of defendant's witnesses on which $1,000 each was paid, and another specific date given when another $500 was paid. All of these payments are testified to have been made on the note, and from the dates given, they were all made before the note became due, and why the $5,500 should have been paid on the $5,000 note does not appear. Moreover, defendant's witnesses, who gave testimony on these matters, further testified that after making the last payment which totalled $5,500, there was still due from the defendant to Finkel $560.34. No payment is indorsed on the note, nor was any explanation made why the note was not produced, delivered up, and cancelled if it had been paid as the witness for the defendant testified. Moreover, the evidence offered by the defendant shows that about two months after it had made the last payment of $500, Finkel presented defendant with a bill showing a balance due Finkel from the defendant of $5,560.42. No explanation is made as to why this bill should have been presented if Finkel had already been paid. Defendant, in its affidavit of merits, set up among other things that there was a failure of the consideration for which the note was given and a further inconsistent defense was that the note had been paid. We think the evidence offered by the defendant is so self-contradictory, and the record is in such a state of confusion on the facts, that the judgment must be reversed.

Plaintiff contends that when the note, indorsed by the payee, was produced by the plaintiff, under the statute it was presumed that the plaintiff was a bona fide holder in due course.

The evidence of the defendant was to the effect that Inlet did not properly complete the building and that therefore it was required to complete it at a cost of more than $3,800, but on this the evidence is in this additional cost was only necessary and had limited. There was further evidence offered on behalf of the defendant that it had paid this sum, and five specific dates are mentioned in the testimony of defendant's witnesses on which $3,800 cheques are paid, and another specific date given when another [illegible] was paid. If of these payments are established to have been made on the note, and from the dates given, they were all made before the note became due, and why the $3,800 should have been paid on the note does not appear. Moreover, defendant's witnesses, who gave testimony on these matters, further testified [illegible] after making the last payment which totalled $8,000, there was still due from the defendants to Inlet $800.00. No payment is mentioned on the note, nor any explanation made why the note was not paid [illegible], and consequently it is had been paid by the witness for the defendant testified. Moreover, the evidence already [illegible] from the [illegible] about two months after it and made the last payment on the [illegible] presented defendant with a bill showing [illegible] the balance due the defendant of $3,150.00. In explanation [illegible] bill should have been presented [illegible] defendant. In the circumstances of [illegible] that there was a failure on the consideration for which the note was given and a further [illegible] defendant [illegible] the note has been paid. [illegible] the evidence [illegible] multi-county [illegible], and the [illegible] of [illegible] on the facts, that the judgment must be reversed.

Plaintiff contended that when the note, [illegible] by the parties, was produced by the plaintiff, under [illegible] presumed that the plaintiff was a bona fide holder in due course.

This presumption, however, was overcome by evidence to the effect that the note was not transferred by Finkel to the plaintiff until after it was due. Finkel testified that he turned the note over to plaintiff "about a couple of weeks" before the suit was brought and the record discloses that the suit was brought October 26, 1928. The note, by its terms, was due ninety days after its date, (June 16th) which would be September 14, which was more than two weeks before the suit was brought. There is other evidence in the record to which we have not specifically referred tending to show uncertainty as to the facts but since there must be a retrial, we will not discuss the evidence further.

The judgment of the Municipal court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

This presumption, however, was overcome by evidence to the effect that the note was not transferred by Finkel to the plaintiff until after it was due. Finkel testified that he turned the note over to plaintiff "about a couple of weeks" before the suit was brought and the record discloses that the suit was brought October 7th, 1928. The note, by its terms, was due ninety days after the date, (June 16th) which would be September 14, which was more than two weeks before the suit was brought. There is other evidence in the record to which we have not specifically referred tending to show uncertainty as to the facts but since there must be a trial, we will not discuss the evidence further.

The judgment of the municipal court is reversed and the cause is remanded for a new trial.

BY THE COURT.

McCurdy, C. J., and Robinson, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

HOWARD GADDIE :
Appellant :
vs. : APPEAL FROM THE
: CIRCUIT COURT OF
WILLIAM R. WHITTAKER : STARK COUNTY.
Appellant :

Jones, J:

This is a suit for slander. Upon a trial, the jury returned a verdict for $12,000 in favor of appellee, Whittaker. The Court required a remittitur of $7,000 and then entered judgment against appellant for $5,000 and costs. The declaration charges that appellant on several occasions said appellee was a thief and had stolen 500 bushels of corn from him.

It is urged that the Court erred in refusing to allow appellant to explain the absence of a witness; that counsel for appellee were guilty of improper conduct during the trial; and that the verdict of the jury is the result of passion and prejudice and could not be cured by a remittitur.

The record does not show that the refusal of the court to allow appellant to explain the absence of the witness Dillon was in any way prejudicial. No statement was made as to what was intended to be proved by the absent witness and it was not shown that he was subpoenaed or that any diligence was exercised to have him in court.

The plea of not guilty admitted that the words alleged to have been spoken were not true, but denied that they were spoken by defendant. (Reeves v. Roth, 179 Ill. App. 95.) The only issue of fact therefore was whether or not appellant spoke the words or the substance of the words averred in the declaration. The weight of the evidence shows that the defendant used the words charged against him and that he repeated them on several occasions. Under the circumstances, a verdict against him was warranted in a proper amount.

But the conduct of appellee's counsel, and the character of their argument to the jury was so inflammatory that it was calculated to unduly influence the jury and cause it to bring in such a grossly excessive verdict as it did. Where damages allowed by a jury are so excessive that they can only be

accounted for on the ground of prejudice, passion, or misconception, a remittitur will not obviate the error. (Wabash Ry. Co. V. Billings, 212 Ill. 27.) The verdict is so excessive that we reason the conclusion the jury acted largely from passion and prejudice. A verdict for so large an amount was unauthorized.

The trial court recognized that fact and required plaintiff to remit approximately 60% of the verdict. We are of the opinion that the amount is still too large. If within twenty days after the filing of this opinion, the plaintiff will remit the further sum of $2,000, the judgment will be affirmed in the sum of $3,000 in this court. Otherwise, it will stand reversed and the cause remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

ROSELLE STATE BANK,
a Corporation,
appellee

vs.

E. J. BASYE, et al
(J. I. PORTER COMPANY)
appellant

APPEAL FROM CIRCUIT COURT
OF DU PAGE COUNTY

Jett, J.

Roselle State Bank, appellee, on September 2, 1921, filed its bill of complaint, making E. J. Basye, L. R. Ash, C. C. Cox, and J. I. Porter Company parties defendant, alleging an indebtedness due it from Basye and praying that an accounting be had between said Basye and complainant and that upon the taking of such account, the defendant Basye be decreed to pay complainant such sum as may be found to be due it, and in default thereof the Master be decreed to sell certain notes, and a real estate mortgage securing the payment thereof, which were held by complainant as collateral security. All of the defendants were non-residents and were served by publication and mailing of notice as provided by statute. None of the defendants appeared, and on November 7, 1921, a decree was duly rendered, which found that on June 30, 1920, Basye became indebted to complainant in the sum of Five Thousand Dollars ($5000.00) which sum he agreed to repay on January 1, 1921, together with 7% interest thereon; that to secure the payment thereof he deposited with complainant, as collateral security, two notes, together with a mortgage upon some Arkansas land; that said notes were executed by defendants Ash and Cox, were dated May 21, 1920, were payable to the order of Basye, and both were endorsed in blank by him; that one note was for the principal sum of $5000.00 and due January 1, 1922, and the other was for $4270.00 due January 1, 1923; that by the mutual agreement of Ash, Cox, Basye, J. I. Porter Company and complainant, the defendants Ash and Cox, executed on August 8, 1921 their two notes each dated June 20, 1921, each payable to the order of H. H. Franzen, who was the Cashier of Complainant, one for the sum of $5304.62, due January 1, 1922, the

ROSELLE STATE BANK, a Corporation, appellee	APPEAL FROM CLINTON COUNTY DR. JOE EDGE JUDGE
vs.	
E. L. BRAYE, et al (E. L. BOTT & COMPANY) appellant	

Oct. 7.

Roselle State Bank, appellee, on September 2, 1921, filed its bill of complaint, making E. L. Braye, L. M. Ian, C. E. Cox, and E. L. Porter Company parties defendant, alleging an indebtedness due it from Braye and praying that an accounting be had between said Braye and complainant and that upon the taking of such account, the defendant Braye be decreed to pay complainant such sum as may be found to be due it, and in default thereof the matter be decreed to sell certain notes, and a real estate mortgage securing the payment thereof, which were held by complainant as collateral security. All of the defendants were non-residents and were served by publication and mailing of notice as provided by statute. None of the defendants appeared, and on November 7, 1921, a decree was duly rendered, which found that on June 3, 1920, Braye became indebted to complainant in the sum of five thousand dollars ($5000.00) which was to be repaid on December 1, 1921, together with 7% interest thereon; that to secure the payment thereof he delivered to complainant, as collateral security, two notes, together with a mortgage upon real estate; that said notes were endorsed by Lawrence Ian and C. E. Cox, dated July 21, 1920, were payable to the order of Braye, and both were endorsed in blank by Braye; that one Cox was the principal sum of $2000.00 was due December 1, 1921, and the other was for $3000.00 due January 1, 1922; that by an oral agreement of Ian, Cox, Braye, E. L. Porter Company and complainant, the defendant [illegible] extension on payment of [illegible]

other for the sum of $4270.00 due January 1, 1923, each bearing 7% interest and each secured by a second mortgage upon the said Arkansas land; that these notes and mortgage were by the agreement of all the parties substituted for the collateral notes dated May 21, 1920, and the mortgage given to secure their payment. The decree further found that there was due complainant the sum of $5076.43, from Basye, and that complainant was entitled to have the collateral sold to pay the same, and decreed that in default of such payment being made within five days that the Master should sell the collateral at public auction. In pursuance to the provisions of this decree the Master, on December 12, 1921, sold all the collateral to said Franzen for the full amount of the debt, interest and costs and complainant recovered from the Master the amount of its debt and interest.

On June 13, 1923, J. I. Porter Company, by leave of court, filed its petition in which the foregoing proceedings were recited and which alleged that it had never received any notice of the pendency of the proceedings until it was so advised by complainant in a letter dated March 22, 1923, written in reply to an inquiry from the Porter Company. In accordance with the prayer of the petition, leave was granted J. I. Porter Company to answer the bill and by its answer it admitted the indebtedness from Basye to Complainant and the delivering to complainant of the collateral notes and mortgage as alleged. The answer then alleged that on March 20, 1921, the said Basye duly assigned to the J. I. Porter Company his equity in said collateral notes and mortgage to secure the payment of $4060.50, Basye then being indebted to the Porter Company in that sum; that said assignment was sent by the Porter Company to the complainant and duly received by it. The answer then alleged that prior to March 20, 1921 Basye was the owner of this Arkansas land, and being indebted to complainant in the sum of $20,000.00, had secured the payment thereof by a first mortgage thereon; that complainant desired to have the balance remaining due on this first mortgage paid, and arranged with George M. Foreman of Chicago to make a new loan of $17,500.00, being the amount then remaining due thereon; that at the request of complainant, acting through its Cashier, Franzen, the J. I. Porter Company agreed to such new

other for the sum of $4270.00 due January 1, 1925, each bearing 7% interest and each secured by a second mortgage upon the said farmers land; that these notes and mortgages were by the agreement of all the parties subsidized for the collateral notes dated May 31, 1920, and the mortgage given to secure their payment. The lessee further found that there was due complainant the sum of $5076.42, from Lewis, and that complainant was entitled to have the collateral sold to pay the same, and lessee had in default of such payment being made within five days that the lessee should sell the collateral at public auction. In pursuance to the provisions of said decree the lessee, on December 17, 1921, sold all the collateral to said lessee for the full amount of the debt, interest and costs and complainant recovered from the lessee the amount of its debt and interest.

On June 18, 1923, J. L. Barber Company, by leave of court filed its petition in which the foregoing proceedings were recited and which alleged that it had never received any notice of the pendency of the proceedings until it was so advised by complainant in a letter dated March 22, 1922, written in reply to an inquiry from the Barber Company. In accordance with the prayer of the petition, leave was granted J. L. Barber Company to answer the bill and by its answer it admitted the indebtedness from Lewis to Complainant and the delivering to complainant of the collateral notes and mortgage as alleged. The answer then alleged that on March 22, 1921, the said Lewis gave only assignment to the J. L. Barber Company his claim in said collateral notes and mortgage to secure the payment of $[illegible].00, Lewis then being indebted to the Barber Company in that amount, that said assignment was sent by the Barber Company to the complainant and duly received by it. The answer then alleged that prior to March 22, 1921 Lewis was the owner of [illegible] land, and being indebted to complainant in the sum of $[illegible].00, was secured the payment thereof by a first mortgage thereon; that complainant desired to have the balance remaining due on said first mortgage paid, and arranged with Lewis [illegible] to [illegible]

plan of re-financing, consenting that H. H. Franzen, Cashier of complainant, might release the second mortgage and cancel the notes which were held by the bank as collateral security, and receive in lieu thereof notes aggregating $9250.00, secured by a third mortgage upon said land, the first and second mortgages being given to secure notes aggregating $17500.00; that according to the re-financing plan, new notes and mortgages were to be executed so that there would then be outstanding, as liens upon said Arkansas land, a first mortgage to secure the payment of $15,000.00, a second mortgage to secure the payment of $2500.00, and a third mortgage to secure the payment of $9270.00, said notes, so secured by said third mortgage, to be held by complainant, and to occupy, when made, so far as the interested parties to this proceeding were concerned, the identical position as the then outstanding second mortgage which complainant then held for its own benefit and for the benefit of J. I. Porter Company; that thereafter said agreement was carried out and that H. H. Franzen conducted all the negotiations requisite to the refunding of the indebtedness secured by said mortgages; that the notes, which had been originally assigned by Basye to the Porter Company, subject to the rights of the complainant, were cancelled and the mortgage securing the same was released of record, and in lieu thereof said bank took two notes, both dated June 20, 1921, both signed by L. R. Ash and C. C. Cox, one ~~xx~~ for $5304.62, due January 1, 1922, and the other for $4270.00 due January 1, 1923, both of these notes were payable to the order of H. H. Franzen and each bore interest at the rate of 7% per annum; that these notes were secured by a mortgage upon ~~xix~~ said land, which mortgage, however, was subject to the mortgages which were given to secure the payment of $17,500.00; that the only purpose ~~xx~~ the J. I. Porter Company had in consenting to the refunding of said indebtedness was to oblige the complainant and to make more secure the collateral which it held for the joint use of the complainant and the Porter Company; that the notes executed by the said Ash and Cox upon the refunding of said indebtedness were at all times good and worth their full face value, and that the J. I. Porter Company did at all times have the financial ability and was at all times ready and is

plan of re-financing, the entire debt of H. Freeman, Debtor of
complainant, did release the second mortgage and cancel the
notes which were held by the bank as collateral security, and
receive in lieu thereof notes aggregating $2230.00, secured by a
third mortgage upon said land, the first and second mortgages
being given to secure notes aggregating $17500.00; that according
to the re-financing plan, new notes and mortgages were to be
executed so that there would then be outstanding, as liens upon
said Arkansas land, a first mortgage to secure the payment of
$15,000.00, a second mortgage to secure the payment of $2230.00,
and a third mortgage to secure the payment of $4270.00, said notes,
so secured by said third mortgage, to be held by complainant,
and to convey, when made, so far as the interested parties to
this proceeding were concerned, the identical position as the
then outstanding second mortgage which complainant then held for
its own benefit and for the benefit of L. L. Porter Company;
that thereafter said agreement was carried out and that H. H.
Freeman conducted all the negotiations requisite to the refund-
ing of the indebtedness secured by said mortgages; that the
notes, which had been originally assigned by Bass to the Porter
Company, subject to the rights of the complainant, were can-
celled and the mortgage covering the same was released of record;
and in lieu thereof said bank took two notes, both dated June
20, 1921, both signed by H. H. Ash and J. O. Cox, one for
$2234.62, due January 1, 1922, and the other for $4270.00
due January 1, 1923, both of these notes were payable to the order
of H. H. Freeman and each bore interest at the rate of 7% per
annum; that these notes were secured by a mortgage upon said
land, which mortgage, however, was subject to the mortgages which
were given to secure the payment of $17,500.00; that the only
purpose of the L. L. Porter Company had in consenting to the
refunding of said indebtedness was to enable the complainant
and to make sure the collateral which it held for
[illegible]

now willing to pay to the complainant the amount due it upon the principal note executed by E. J. Basye, and to take over from complainant the collateral security, which it held; that the complainant knew these facts, knew the plans of business of the Porter Company, and could, had it so desired, informed the complainant that it would no longer carry the Basye indebtedness and had that been done, the Porter Company would have protected its interest in said collateral.

Basye, Ash and Cox, after filing written entries of appearance, consented that the Porter Company might be granted leave to answer the original bill, and that the court should enter such further order as it might deem proper. A hearing was had and the court entered a decree confirming the former decree and from this decree the J. I. Porter Company appeals.

The evidence discloses facts substantially as alleged in the answer of appellant. On March 31, 1921, appellant wrote appellee advising it that it held Basye's note for $4060.00, and informing the bank that Basye had given them an assignment of his equity in the collateral which appellee held. This letter concluded, viz; "we will appreciate it very much if you will attach this order to the papers you hold in the matter, as we are confident you would not object to taking care of this matter for us when you have received the amount due you. We took this matter up with Mr. Noble, who we understood negotiated the deal, and he assured us that this would be agreeable to you." With this letter appellant sent the assignment, executed by Basye directed to the First State Bank of Roselle, dated March 20, 1921, which states: "I hereby assign to the J. I. Porter Company of Stuttgart, Arkansas, my interest in the notes and mortgage amounting to $9270.00, secured by 460 acres in Section Two, Township Four South, Range Five West, Northern District of Arkansas County, Arkansas, which I put up with you to secure a loan of $5000.00, to the amount of $4060.00, together with interest from date at 10% as evidenced by a note of this amount in their possession". Appellee had considerable correspondence with the company with respect to its interest in this matter, and never intimated that it would not recognize this assignment.

now willing to pay to the complainant the amount due it upon the principal note executed by A. J. Hayes, and to take over from complainant the collateral security, which it held; that the complainant knew these facts, knew the place of business of the Porter Company, and could, had it so desired, informed the complainant that it would no longer carry the note indicated- mean and had that been done, the Porter Company would have protected its interest in said collateral.

Hayes, Ash and Orr, after filing written entries of appearance, consented that the Porter Company might be granted leave to amend the original bill, and that the court should enter order upon further notice or it might deem proper. A hearing was had and the court entered a decree rectifying the Porter decree and from this decree the C. L. Porter Company appeals.

The evidence discloses fraud committed by an officer in the employ of appellee. On March 1, 1921, appellant made application relying on fraud to avoid the transaction for shoes, and thereafter the bank that made the loan was informed of the claim of fraud in the relation that existed between them. This letter concluded, viz: "We will appreciate if it will be in your mind with this order to the person who talk in the matter, as we are confident you would not object to making some of this matter for us when you were received the account was, we look this matter up with us. While, we do not think complained the deal, and we learned we just this would be necessary to do."

With this letter appellant sent the C. L. Porter, accepted by Hayes directed to the Pitt Co. Bank of Greenville. On March 30, 1921, which stated: "I agree to pay to the C. L. Porter Company of Kansas City, Missouri, or to the order in the sum of [illegible] dollars, payable on demand, with interest at the rate of [illegible] per cent per annum, [illegible] to secure payment of a note of even date, herewith, [illegible] of [illegible] company, [illegible] with you to [illegible] of [illegible] in the amount of [illegible], together with interest from date at the rate of [illegible] per cent per annum

Appellant acceded to the wishes of appellee when it desired to refinance its first lien and the instrument, which appellant executed set forth very fully not only the transaction of the several parties from its inception, the status thereof at that time as well as the proposed refinancing plan and specifically made reference to the assignment by Basye to appellant, of his equity in the collateral held by appellee. All the parties understood that this collateral was held by the bank not only to protect its loan ~~xx~~ of $5000.00 to Basye, but also, to protect the indebtedness of Basye to appellant. No direct notice to the company, by letter or otherwise, was given to appellant of the pendency of this foreclosure proceeding. Constructive notice in accordance with the statute was given, but a defendant, who is not served with summons or with a copy of the bill, or who has not received a copy of the notice required to be sent him by mail, may file a petition within three years and be permitted then to file an answer and have a hearing as though he had been personally served. Smith-Hurd Revised Statute 1927, Chapter 22, Section 19. The evidence discloses that the first notice appellant received of this proceeding was when its president wrote to appellee, making an inquiry about when a remittance might be expected to recover the amount due it and appellee replied that it had previously instituted foreclosure proceedings and had caused the collateral, which it held, to be sold under a decree, and that there was no amount to be paid to appellant. Upon receipt of this information, appellant immediately sent a representative to Wheaton to make an investigation and it then, for the first time, learned that Franzen, the Cashier of appellee, had become the purchaser of the collaterals for $5234.75, being exactly the amount of debt of appellee, together with interest and costs. The evidence further discloses that the collateral notes were paid in full at their maturity, and that as a result of the transaction, either appellee or its cashier profited by the transaction, in excess of $5000.00. Both had full knowledge of the claim of appellant. Ash and Cox were solvent and successful business men, and appellee and its cashier knew this. The collateral, which appellee held, was good and appellee and its cashier

Appellant appeals to the wisdom of appellee when it decided to refinance the first loan and the instrument, which appellant executed set forth very fully not only the transaction of the several parties from its inception, but also the interest at that time as well as the proposed refinancing plan and specifically made reference to the assignment by Hugo to appellant, or his equity in the collateral held by appellee. All the parties understood that this collateral was held by the bank not only to protect its loan of $5000.00 to Hugo, but also, to protect the indebtedness of Hugo to appellant. No direct notice to the company, by letter or otherwise, was given to appellant of the pendency of this foreclosure proceeding. Inadvertive notice in accordance with the statute was given, but a default, and it is not served with summons or with a copy of the bill, or was not received a copy of the notice required to be sent him by mail, may file a petition within three years and be reinstated then to file an answer and have a hearing as though he had been correctly served. Until-had notice since 1.00, October 27, notice to. The evidence discloses that the first notice appellant received of this proceeding was when its president went to appellee, making an inquiry about what a redemption might be expected to recover the amount due it and appellee replied that it had previously instituted foreclosure proceedings and had sold the collateral, which it held, to be held under a decree, and that there was no money to be paid to appellant. Upon receipt of this information, appellant immediately [illegible] to proceed to make an investigation and it then, for the first time, learned that Hugo, the mortgagor of appellee, had [illegible] the amount of the collateral [illegible], [illegible] the amount of debt of appellee, [illegible] costs. The evidence further discloses that the collateral [illegible] by Hugo in full at their agreed, [illegible] time also, either appellee or its agents provided by the mortgagor, in excess of $1,000.00. Hugo, [illegible] knowledge of the

knew that a sufficient amount could be realized therefrom not only to pay appellee the amount that was due it, but to pay the claim of appellant in full. Shortly after appellant consented to the plan of refinancing, appellee filed its bill and caused the collateral, which it held, to be sold to its cashier. Inexcusable bad faith upon the part of appellee toward appellant is disclosed by the undisputed facts in this record and it would be most inequitable to permit appellee, or its cashier, to retain the amount which in equity and good conscience belongs to appellant. The order confirming the original decree was erroneous.

The decree of the Circuit Court is reversed, and the cause remanded to that court with directions to enter a decree in favor of appellant, and against appellee, and for an accounting to ascertain the amount which may be due upon the Basye $4060,00 note held by appellant company and for payment by appellee of said amount due on said note to the J. I. Porter Company.

Reversed and Remanded with directions.

knew that a sufficient amount could be realized therefrom not only to pay appellee the amount that was due it, but to pay the claim of appellant in full. Shortly after appellant concerned to the plan of refinancing, appellee filed its bill and caused the collateral, which it held, to be sold to its president. Inexcusable bad faith upon the part of appellee toward appellant is disclosed by the undisputed facts in this record and it would be most inequitable to permit appellee, or its assignee, to retain the amount which in equity and good conscience belongs to appellant. The order confirming the original decree was erroneous.

The decree of the chancery court is reversed, and the cause remanded to that court with directions to enter a decree in favor of appellant, and against appellee, and for an accounting to ascertain the amount which may be due upon the note $4000.00 note held by appellant company and for payment by appellee of such amount due on said note to the L. L. Cohen Company.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 19 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8048 Agenda No. 17

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1929.

Frank Pavlik, Assignee of George Pavlik and Roy Pavlik, doing business as Pavlik Brothers, Appellant,	
vs.	Appeal from the Circuit Court of Lake County.
Joe Menoni and Egidio Mocogni, doing business as Menoni and Mecogni, Appellees.	

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellant against appellees in the Circuit Court of Lake County, to recover a balance of $796.68, alleged to be owing by appellees to appellant for certain labor performed and materials furnished appellees. Summons was duly served, returnable to the October term, 1928.

On October 11, 1928, appellees were defaulted, damages were assessed against them and judgment was rendered thereon. On December 19, 1928, appellees made a motion to vacate said judgment, which motion was denied. On December 20, notice thereof having been given, appellees again moved said court to vacate said judgment. Thereafter, on January 5, 1929, being one of the regular judgicial days of the December term of said court, said motion was allowed, and an entry was made ordering said judgment vacated, execution stayed, and giving appellees leave to plead within three days. Appellant elected "to stand by the judgment heretofore entered in said cause" and prayed an appeal to this court.

It is contended by appellant that, the term at which said judgment was rendered, having ended, the court was without juriddiction to vacate said judgment.

General No. 8048 Agenda No. 17

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1929.

Frank Pavlik, Assignee of George Pavlik and Roy Pavlik, doing business as Pavlik Brothers, Appellant,	
vs.	Appeal from the Circuit Court of Lake County.
Joe Menoni and Egidio Moconi, doing business as Menoni and Moconi, Appellees.	

OPINION by BOGGS, J.

An action in assumpsit was instituted by appellant against appellees in the Circuit Court of Lake County, to recover a balance of $796.68, alleged to be owing by appellees to appellant for certain labor performed and materials furnished appellees. Summons was duly served, returnable to the October term, 1928.

On October 11, 1928, appellees were defaulted, damages were assessed against them and judgment was rendered thereon. On December 19, 1928, appellees made a motion to vacate said judgment, which motion was denied. On December 20, notice thereof having been given, appellees again moved said court to vacate said judgment. Thereafter, on January 3, 1929, being one of the regular judicial days of the December term of said court, said motion was allowed, and an entry was made ordering said judgment vacated, execution stayed, and giving appellees leave to plead within three days. Appellant objected "to stand by the judgment heretofore entered in said cause" and prayed an appeal to this court.

Section 89 of the Practice act provides, among other things:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice."

It therefore follows that, upon proper showing, a judgment may be set aside at a subsequent term. The question for determination is as to whether such proper showing was made.

The affidavit filed by appellees in support of said motion was made by J. A. Miller, their attorney, and states that he was engaged "by them to enter an appearance" in said cause; "that on or about September 20, 1928, he had prepared an appearance, a plea and affidavit of merits, and that he took said papers to the court house, intending to file the same in the office of the circuit clerk in the above entitled cause; that at the time he had several other papers and office files in his possession, and that he believed said papers were filed in the office of the clerk, but that the same do not appear to be filed of record, and if the same were not filed, then the same have been lost; that he has made diligent search in his own office and in the clerk's office, and that he is not able to find said papers, except his own office copy, and that, accordingly, he has prepared pleadings which are a correct and true copy of the original pleadings which he intended to file, thought he had filed, and now states on information and belief that the same were filed, but that they have been lost; affiant further states that, relying upon his office records and upon his personal recollection of having filed pleas for the defendants, he has answered the trial call in the above entitled cause, appeared and has stated that the defendants were ready for trial, and had no knowledge that his plea as attorney for said defendants was not on file until within the last few days when an execution was served upon said defendants and they advised this affiant that said execution had been served upon them; that the said defendants as this affiant verily believes

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It therefore follows that, upon proper showing, a judgment may be set aside at a subsequent term. The question for determination is as to whether such proper showing was made.

The affidavit filed by appellees in support of said motion was made by L. A. Miller, their attorney, and states that he was engaged "by them to enter an appearance" in said cause; "that on or about September 20, 1929, he had prepared an appearance, a plea and affidavit of merits, and that he took said papers to the court house, intending to file the same in the office of the circuit clerk in the above entitled cause; that at the time he had several other papers and office files in his possession, and that he believed said papers were filed in the office of the clerk, but that the same do not appear to be filed of record, and if the same were not filed, then the same have been lost; that he has made diligent search in his own office and in the clerk's office, and that he is not able to find said papers, except his own office copy, and that, accordingly, he has prepared pleadings which are a correct and true copy of the original pleadings which he intended to file, thought he had filed, and now states on information and belief that the same were filed, but that they have been lost; affiant further states that, relying upon his office records and upon his personal recollection of having filed pleas for the defendants, he answered the trial call in the above entitled cause, appeared and has stated that the defendants were ready for trial, and had no knowledge that his plea as attorney for said defendants was not on file until within

have a good defense to the plaintiff's claim; that they paid a sum of money which was accepted in full settlement, satisfaction and release of the plaintiff's claim before suit was started and that the judgment recovered by the plaintiff should be vacated, set aside and held for naught," etc.

No answer to said motion was filed on behalf of appellant. An affidavit was filed by theattorney for appellant, which states among other things that said attorney has made a diligent search in the office of the circuit clerk of said county for said appearance, plea and affidavit of merits alleged to have been filed by appellees, and that he "cannot find that any papers were filed by defendants or defendants' attorney, prior to the motion to vacate judgment, filed December 19, 1928, which was after the end of the October term."

While the writ of error coram nobis was abolished by the statute above quoted, yet, "it did not abolish the essentials of the proceeding, which in nature remains the same." Mitchell v. King, 187 Ill. 452-457; Domitski v. American Linseed Co., 221. Ill. 161-164. To the same effect is Smith v. Fargo, 307 Ill. 300-304.

"Errors in fact, committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, by motion in writing." Mitchell v. King, supra, 457.

"The proceeding is one at law, and is independent of the proceeding in which the judgment sought to be set aside was rendered, and that, unless an issue of law is made upon the motion in the trial court, the question there passed upon is a question of fact, viz., whether the court in the former proceeding committed any error in fact." Domitski v. American Linseed Co., supra, 164.

"The motion provided for under the statute is the plaintiff's declaration in the new suit, to reverse or recall the judgment." Harris v. Chicago House Wrecking Co., 314 Ill. 500-505. To the same effect is Smith v. Fargo, supra, 304.

While counsel for appellant concedes that this proceeding is under section 89 of the Practice act, he insists

have a good defense to the plaintiff's claim; that they paid a sum of money which was accepted in full settlement, satisfaction and release of the plaintiff's claim before suit was started and that the judgment recovered by the plaintiff should be vacated, set aside and held for naught," etc.

No answer to said motion was filed on behalf of appellant. An affidavit was filed by the attorney for appellant, which states, among other things that said attorney has made a diligent search in the office of the circuit clerk of said county for said appearance, plea and affidavit or merits alleged to have been filed by appellees, and that he "cannot find that any papers were filed by defendants or defendants' attorney, prior to the motion to vacate judgment, filed December 19, 1928, which was after the end of the October term."

While the writ of error coram nobis was abolished by the statute above quoted, yet, "it did not abolish the essentials of the proceeding, which in nature remains the same." Mitchell v. King, 187 Ill. 492-497; Domitski v. American Biscuit Co., 321 Ill. 161-164. To the same effect is Smith v. Ramp, 304 Ill. 300-304.

"Errors in fact, committed in the proceedings of any court of record, and which by the common law could have been corrected by said writ, may be corrected by the court in which the error was committed, by motion in writing." Mitchell v. King, supra, 497.

"The proceeding is one at law, and is independent of the proceeding in which the judgment sought to be set aside was rendered, and that, unless on issue of law, issues which the motion in the trial court, the question there passed upon is a question of fact, viz., whether the court in the common proceeding committed any error in fact." Domitski v. American Biscuit Co., supra, 164.

"The motion provided for under the statute in the plaintiff's declaration in the new suit, to reverse or vacate the judgment,

that the showing made by appellees is not sufficient. The sufficiency of the motion or affidavit was not raised in the trial court, either by demurrer to the evidence or by motion in arrest of judgment, and was not raised in this court by assignment of error. The objection made in the trial court to the allowance of said motion is in substance the statement made by counsel in open court: "If he has not filed his appearance and plead, as a matter of law he is not entitled to open up the judgment. The term has gone by and he cannot open it up."

"A misprision of the clerk may properly be corrected by motion in the nature of a writ of error coram nobis, where it involves or constitutes a matter of fact, unknown to the court at the time the judgment was entered, and not appearing upon the face of the record, and which, if known, would have precluded the rendition of the judgment. People v. Niman, 276 Ill. 430-434; Warner v. Wende, 214 App. 431; DiMeo v. Hines, 229 App. 486; Nogle Co. of Illinois v. Cunningham, 231 App. 154-158; Ness v. Bell, 246 App. 79. In the latter case, this court, after quoting the above mentioned statute, at page 83 says:

"Under this section, a misprision of the clerk in failing to enter and continue a motion to quash an attachment, which resulted in the entry of a judgment against the defendant, without neglect on his part, was an error in fact which did not appear of record, and warranted the setting aside of the judgment." Citing Warner v. Wende, supra.

In Smith v. Fargo, supra, the court, in discussing the question of the sufficiency of the motion, evidence, etc., in a case of this character, at page 304 says:

"The questions here raised were considered in the case of Domitski v. American Linseed Co. 221. Ill. 161. That was a proceeding under what is now section 89 of the Practice act, to vacate and set aside a judgment previously rendered. The complaining party filed his motion for that purpose, setting up the reasons relied on. It does not appear that the opposite party filed anything in reply, but objected to the motion on the ground the term at which the judgment was rendered had expired, and the court had no jurisdiction. Affidavits were read in support of the motion, to all of which a general objection was made. The court sustaine

that the showing made by appellee is not sufficient. The sufficiency of the motion or affidavit has not raised in the trial court, either by demurrer to the evidence or by motion in arrest of judgment, and was not raised in this court by assignment of error. The objection made in the trial court to the allowance of said motion is in substance the statement made by counsel in open court: "If he has not filed his appearance and plead, as a matter of law he is not entitled to open up the judgment. The term has gone by and he cannot open it up."

"A vacation of the judgment properly to consider a by motion in the nature of a writ of error coram nobis, where it involves or constitutes a matter of fact, unknown to the court at the time the judgment was entered, and not appearing upon the face of the record, and which, if known, would have prevented the rendition of the judgment. People v. Simon, 270 Ill. 430-434; Barber v. Tomle, 214 App. 481; Bimco v. Hines, 225 App. 486; Mogie Co. of Illinois v. Cunningham, 221 App. 1[illegible]; Kane v. Bell, 246 App. 70. In the latter case, this court, after quoting the above mentioned statute, at page 80 says:

"Under this section, a petitioner is required in filing to enter and continue a motion to grant an extraordinary, coram nobis, relief in the entry of a judgment against the defendant, without neglect on his part, was an error in fact which did not appear of record, and which affected the setting aside of the judgment." citing Barber v. Tomle, supra.

In Smith v. Kerzo, supra, the court, in discussing the question of the sufficiency of the motion, stated, at page 4[illegible], in a case of this character, at page 504 says:

"The questions here raised are considered in the case of Dunham v. American Bonded Co. 221 Ill. 1[illegible]. That was a proceeding under what is now section 89 of the Civil Practice Act, to vacate and set aside a judgment previously rendered. The complaining party filed his motion for that purpose, setting up the reasons relied on. It does not appear that the opposite party filed anything in reply, but objected to the motion on the ground the term

the motion and vacated the former judgment, to which exceptions were taken. * * * The plaintiff in error in that case contended in this court that the motion did not, on its face, disclose any error in fact, and that the court erred in assuming jurisdiction of it. The court held that was a question of law, which should have been saved in some appropriate way recognized by law. As that was not done and no motion in arrest of judgment was made, the question whether the motion on its face disclosed any error in fact was not preserved for review. It was also urged in that case that the matters set up in the affidavits filed in support of the motion were not such as to justify annulling the judgment for error in fact. On that question the court said, if it was desired to present the question as one of law whether there was any evidence to sustain the order and judgment it was necessary to demur to the evidence or by some other mode call for a ruling by the trial court on that question. "Such course is necessary to preserve the question as one of law even though there is no conflict in the evidence upon which the trial court based its finding. Plaintiff in error did not follow this course. Therefore the question whether the affidavits, or the matters therein contained, proved any error in fact in the former proceedings cannot be considered here."

In this case no answer was filed to said motion, the evidence was not demurred to, and no motion in arrest of judgment was made. The sufficiency of the motion or of the affidavit in support thereof, even though the same be entirely insufficient, is not submitted for our determination. Under the above authorities, there is therefore no question of law or fact presented by this record for our consideration.

The judgment of the trial court will therefore be affirmed.

Judgment affirmed.

the motion and vacated the former judgment, to which exceptions were taken. * * * The plaintiff in error in that case contended in this court that the motion did not, on its face, disclose any error in fact, and that the court erred in assuming jurisdiction of it. The court held that was a question of law, which should have been saved in some appropriate way recognized by law. As that was not done and no motion in arrest of judgment was made, the question whether the motion on its face disclosed any error in fact was not preserved for review. It was also urged in that case that the matters set up in the affidavits filed in support of the motion were not such as to justify annulling the judgment for error in fact. On that question the court said, if it was desired to present the question as one of law whether there was any evidence to sustain the error and judgment it was necessary to demur to the evidence or by some other mode call for a ruling by the trial court on that question. Such course is necessary to preserve the question as one of law even though there is no conflict in the evidence upon which the trial court based its finding. Plaintiff in error did not follow this course. Therefore the question whether the affidavits, or the matters therein contained, proved any error in fact in the former proceedings cannot be considered here."

In this case no answer was filed to said motion, the evidence was not demurred to, and no motion in arrest of judgment was made. The sufficiency of the motion or of the affidavit in support thereof, even though the same be entirely insufficient, is not submitted for our determination. Under the above authorities, there is therefore no question of law other than presented by this record for our consideration.

The judgment of the trial court will therefore be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 639

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8105 Agenda No. 16

In The

APPELLATE COURT OF ILLINOIS

Second District

OCTOBER TERM, A. D. 1929

BERTHA GLAFKA, Appellant,	:	Appeal from the
-vs-	:	Circuit court of
CITIZENS STATE BANK OF WALNUT, and JOHN L. APPLEN, Sheriff of Bureau County, Appellees.	:	Bureau County

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OPINION by BOGGS, P.J.

On February 20, 1925, Edward J. Glafka gave to appellant, his mother, a chattel mortgage on certain horses, harness, cows, machinery, etc., to secure a note of $8,000, due March 1, 1930. On February 22, 1929, a judgment was entered in the circuit court of Bureau County against the said Glafka and one Henry J. Lang, his father in law, for $669.47. An execution thereon was levied on the property covered by said chattel mortgage on March 23, 1929. Appellant gave notice for trial of the right of property as provided by statute. A jury was waived and a trial was had, resulting in a finding and judgment in favor of appellees. To reverse said judgment, this appeal is prosecuted.

The mortgage given to appellant, being to secure a note falling due more than three years after date, would not be good as against judgment creditors having executions levied on said property, unless the mortgagee had taken possession of the mortgaged property. Appellant recognizes this rule, but insists that she had taken possession of said property prior to the levy.

It was stipulated on the trial that appellant had delivered the chattel mortgage in question to one D. F. Conklin, a constable of said county, with instructions to foreclose the same.

General No. 8105 Agenda No. 16

In The

APPELLATE COURT OF ILLINOIS

Second District

OCTOBER TERM, A. D. 1929

BERTHA GIARKA, Appellant,	:	Appeal from the
	:	
-vs-	:	Circuit court of
	:	
CITIZENS STATE BANK OF MALMUT, and JOHN L. APPLEGATE, Sheriff of Bureau County, Appellees.	:	Bureau County

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OPINION by BROGAN, P.J.

On Feb uary 20, 1923, Edward J. Giarka gave to appellant, his mother, a chattel mortgage on certain horses, harness, cows, machinery, etc., to secure a note of $4,000, due March 1, 1930. On February 21, 1928, a judgment was entered in the circuit court of Bureau County against the said Giarka and one Henry J. Lang, his father in law, for $[illegible]. An execution thereon was levied on the property covered by said chattel mortgage on March 23, 1929. Appellant gave notice for trial of the right of property as provided by statute. A jury was waived and a trial had, resulting in a finding and judgment in favor of appellee. To reverse said judgment, this appeal is prosecuted.

The mortgage given to appellant, being to secure a note falling due more than three years after date, would not be good as against judgment creditors having executions levied on said property, unless the mortgage had been accompanied by the act-
ual property. Appellant concedes this to be, but insists that

Conklin testified:

"On the 20th of March I started out there (to the farm occupied by said mortgagor) and met Mr. Glafka on the road. I got out and served the notice on him and asked him if the property was there and he said yes. I told him what I was going to do and he said, 'Go ahead and take the property,' but he would go to Princeton and stop it. I then tacked up the notices and went back to town, and I went out again that evening and asked him if he would do the chores if I would pay him for it, and he said he would. * * * I went out to his place every day, the 20th, and the 21st and the 22nd, and on Saturday, the 23rd, the sheriff came and served the papers and took the stuff away from me. I went out and looked over the place and looked after the chores, and one afternoon I was out there all afternoon. On the 20th or 21st of March he (Glafka) asked permission to use a part of the property, and asked me if he could use the team, and I told him to go ahead and use it, it was all right with me if he wanted to use it and took good care of them. That was on the 20th or 21st, he had some timothy seed and wanted to haul out some fertilizer on the field. The weather got bad and he didn't use them and the sheriff took them away from him on Saturday."

This witness further testified that Glafka rendered him a bill for the feed given the stock, and for his work in taking care of the same.

Flaherty, the deputy sheriff who served said notice, testified: "I received a notice and took it to Walnut and gave it to Dell Conklin. I told him I was sent up there with a writ and execution on Glafka and a notice of levy on the property. * * * I levied on this property. I appointed a custodian, Henry Lang was the custodian. I don't know whether he took possession of the property or not."

The testimony on behalf of appellees consisted of the testimony of John L. Applen, the sheriff, and of Henry J. Lang. Applen testified that he gave the execution on said judgment to his deputy Flaherty; that at that time the condition of the roads in that community was very bad; that he got stuck in the mud; that he moved the property in question from Glafka's place on March 25. Lang testified: "On the 25th of March I moved the stuff. The sheriff told me to move it ."

In rebuttal, one George Short, cashier of appellee bank, testified that Conklin posted in the bank notices of sale under

property in question from Gistke's place on March 25. Lange testified:

"On the 20th of March I started out there (to the farm occupied by said mortgagor) and met Mr. Gistke on the road. I got out and served the notice on him and asked him if the property was there and he said yes. I told him what I was going to do and he said, 'Go ahead and take the property,' but he would go to Princeton and stop it. I then taoked up the notices and went back to town, and I went out again that evening and asked him if he would do the chores if I would pay him for it, and he said he would. * * * I went out to his place every day, the 20th, and the 21st and the 22nd, and on Saturday, the 23rd, the sheriff came and served the papers and took the stuff away from me. I went out and looked over the place and looked after the chores, and one afternoon I was out there all afternoon. On the 20th or 21st of March he (Gistke) asked permission to use a part of the property, and asked me if he could use the team, and I told him to go ahead and use it, it was all right with me if he wanted to use it and took good care of them. That was on the 20th or 21st, he had some timothy seed and wanted to haul out some fertilizer on the field. The weather got bad and he didn't use them and the sheriff took them away from him on Saturday."

This witness further testified that Gistke rendered him a bill for the feed given the stock, and for his work in taking care of the same.

Flaherty, the deputy sheriff who served said notice, testified: "I received a notice and took it to Walnut and gave it to Dell Donkin. I told him I was sent up there with a writ and execution on Gistke and a notice of levy on the property. * * * I levied on this property. I appointed a custodian, Henry Lang was the custodian. I don't know whether he took possession of the property or not."

The testimony on behalf of appellees consisted of the testimony of John L. Applen, the sheriff, and of Henry L. Lang. Applen testified that he gave the execution on said judgment to his deputy Flaherty; that at that time the condition of the roads in that community was very bad; that he got stuck in the mud; that he moved the

said foreclosure proceeding. He further testified: "I had already been informed that she had started foreclosure proceedings. I knew before the 20th of March that Mrs. Glafka had started to foreclose her mortgage on this property."

The foregoing is in substance the testimony heard by the court on said trial. The question therefore for determination is whether appellant had taken possession of the property in question, so as to preserve her mortgage lien as against the judgment of appellee bank.

If a mortgagee take possession of mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity. Chapron v. Feikert, 68 Ill. 284-285; Frank v. Miner, 50 Ill. 444-448; Springer v. Lipsis, 209 Ill. 261-263; First National Bank v. Barse Commission Co., 198 Ill. 232-233, citing McTaggart v. Ross, 14 Ind. 230; Brown v. Webb, 20 Ohio 389.

"No particular mode of taking or retaining possession is required. It is not necessary that the property be delivered to the mortgagee in person--delivery to an agent is equally effectual." First National Bank v. Barse Commission Co., supra; Williams v. Head, 219 App. 5;11.

"No removal of the property from the mortgaged premises is essential, if the mortgagee has actual control of it there." Jones on Chattel Mortgages, sec. 180; First National Bank v. Barse Commission Co., supra, 253; Williams v. Head, supra.

"What constitutes a change of possession depends upon the character and situation of the property." First National Bank v. Barse Commission Co., supra, 253; Williams v. Head, supra, 11.

It is insisted by counsel for appellee bank that, as the property in question consisted of live stock, farm machinery, etc., and inasmuch as appellant did not remove said property from the farm occupied by said mortgagor, there was not a sufficient taking of possession as against the execution of appellee bank. Under the above authorities, it is not necessary in all cases to remove property covered by a chattel mortgage, even though it may consist of live stock.

In First National Bank v. Barse Commission Co., supra,

said foreclosure proceeding. He further testified: "I had already been informed that one had started foreclosure proceedings. I knew before the 20th of March that one. Giebke had started to foreclose her mortgage on this property."

The foregoing is in substance the testimony heard by the court on said trial. The question therefore for determination is whether appellant had taken possession of the property in question, so as to preserve her mortgage lien as against the judgment of appellee bank.

If a mortgagee takes possession of mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not recorded and had recorded, or the record be satisfied by reason of any irregularity. Chapman v. Reikert, 38 Ill. 521-525; Frank v. Shaw, 30 Ill. 444-448; Springer v. Ripple, 149 Ill. 301-305; First National Bank v. Horse Commission Co., 158 Ill. 638-642, citing Lombard v. Moss, 14 Ind. 290; Brown v. Cady, 52 Ill. App. 383.

"No particular mode of taking or retaining possession is required. It is not necessary that the property be delivered to the mortgagee in person--delivery to an agent is equally effectual." First National Bank v. Horse Commission Co., supra; Hill v. Hall, 214 App. 6;11.

"No removal of the property from the mortgaged premises is essential, if the mortgagee has actual control of it there." Horse Commission Co., supra, 158; Hill v. Hall, supra.

"Such possession is a change of [illegible] the [illegible] and [illegible] v. Horse Commission Co., [illegible] 11.

It is [illegible] the property in question consisted of live stock, [illegible], etc., and inasmuch as [illegible] the farm occupied by said mortgagor, there was not a [illegible] the-

the chattel mortgage taken by the Barse Commission Company purported to cover 2,100 head of cattle, being all of the cattle owned by the mortgagor, "located in my pastures near Waggoner, Creek Nation, Indian Territory, and to be fed and grazed in said Creek Nation until shipped to the order of George R. Barse Commission Co." The mortgagee, becoming convinced that there was not the number of cattle in said pastures named in said chattel mortgage, elected to take possession of said cattle. The mortgagee was represented in this matter by one Stonebreaker, who employed one Redmon, a former foreman of the mortgagor's, to take charge of said cattle for the mortgagee. Stonebreaker himself was out at the ranch from time to time and assisted in cutting out the cattle for shipment, etc., but when he was not there, Redmon was in charge of the cattle. The cattle were not taken from the pastures in which they were located at the time they were mortgaged and, as stated, Redmon had been the foreman of the mortgagors on said ranch, in charge of said cattle, up to the time of his employment by the mortgagee. The court held that the possession taken by the mortgagee was sufficient.

In this case, appellant had ordered the foreclosure of her chattel mortgage; the constable at once served notice on the mortgagor and the mortgagor told him he could take possession of the property; he at once posted notices for the sale of said property, one of said notices being posted on the farm where the property was located, and one was posted in appellee's bank, giving notice that the sale would take place on the farm. Mr. Short, the cashier of appellee bank, testified with reference to the posting of the notice in the bank, and also that the mortgagor had, previous to that time, notified him that appellant was foreclosing said mortgagee. The evidence is also uncontradicted that Conklin was at Glafka's farm, where said stock and machinery was located, on the day Glafka was served with notice, and on each following day until appellee sheriff levied said execution, and until he had been served with notice by said sheriff. The acts of the constable, in going to the home of the mortgagor from day to day and looking after this property, and the posting of notices of sale, amounted

to a taking or potsession, even though said consideration may have employed the mortgagor to lead said about. We therefore hold that the trial court erred in finding the issues for appellee, and in rendering judgment against appellant.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 15 19[illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8113 Agenda No. 1

In The
APPELLATE COURT OF ILLINOIS
Second District
OCTOBER TERM, A.D. 1929

EVA FRIDAE, Appellant,	)	
-vs-	)	Appeal from the Circuit Court of Will County.
MIKE FRIDAE, Appellee.	)	

OPINION by BOGGS, P. J.

A bill was filed in the circuit court of Will County by appellant against appellee, setting forth that said parties were intermarried on January 16, 1926; that "on or about the 25th day of February, A. D. 1926, the said Mike Fridae willfully deserted and absented himself from your oratrix, his wife, without reasonable cause, and persisted in such desertion from that time forward for the space of two years and still continues to so absent himself," praying that said marriage relation be dissolved, etc. To said bill, appellee filed an answer, denying said charge of desertion, etc. A trial was had, resulting in a finding in favor of appellee, and a decree was entered, dismissing said bill for want of equity. To reverse said decree, this appeal is prosecuted.

Said parties were married on January 16, 1926, and lived together some six to eight weeks, the exact time being more or less indefinite. At the time of their marriage, said parties were about fifty-seven years of age. Appellant had been previously married, and had by her first husband sixteen children. The evidence on the part of appellant consisted of her own testimony and that of her two sons, who were living in the family. Appellant was of Polish descent, and testified through an interpreter. Among other things, she stated that; "He (appellee) didn't treat her

General No. 8113 Agenda No. 1

In re

Supreme Court of Illinois

Second District

October Term, A.D. 1926

EVA FRIEDA, Appellant,	
-vs-	Appeal from the
MIKE FRICA, Appellee.	Circuit Court of
	Will County.

Opinion by MORAN, P. J.

A bill was filed in the circuit court of Will County by appellant against appellee, setting forth that said marriage were intermarried on January 10, 1924; that "on or about the 6th day of February, A. D. 1926, the said Mike Frica willfully deserted and abandoned himself from your orator, via wife, without reasonable cause, and persisted in such desertion from that date for-ward for the space of two years; and still continues to so desert himself," praying that said marriage relation be dissolved, etc. To said bill, appellee filed an answer, denying main charge of desertion, etc. A trial was had, resulting in a finding in favor of appellee, and a decree was entered, dismissing the bill for want of equity. To reversal of said decree, appellant is prosecuting.

Said parties were married in January of, 1924, and lived together some six months or more, and since then (being some or less intervals). In the time of their marriage, said parties were about fifty-seven years of age. Appellant had been in Poland married, and had by her first husband grown children. Appellee was the father of appellant, married and not a bachelor, and had of her two born, who were living in the house.

right, beat her. * * * That he drink continually and whenever he was drunk he would beat her. * * * That when he got drunk he beat her and go away and then come back with an excuse that he was sick or something like that. He left me. * * * He didn't say nothing when he left. He said he will fix her or he will show her yet." She further testified that, after he left, "He never offered me anything."

The record discloses that said parties were having a garage built, that they did not agree with reference thereto, and that appellant's sons had something to do with the controversy. Appellant testified: "I went into the bedroom and told him (appellee) that if he didn't go to work he could get out of there. He left four days after that." She was asked by the court if she gave appellee his clothes and told him to get out. She answered: "When he had the clothes together she saw him out in the automobile, ready to leave. * * * She didn't say nothing; he just says he is going to fix her." She further testified: "I don't want to live with Mike Fridae now. I am too old. My two boys were living with me and Mike at the time of the separation. One boy was 21and one was 25. * * * Boys did not want him around, but they never did threaten to throw him out."

Appellant's son John testified: "After they were married he (appellee) was all right, I guess, for about three or four days, and then he got drunk, and a lot of abusive language, and threatened her. Of course, I never saw him strike her, but he threatened her plenty of times. * * * I was there the day Mike Fridae left. My mother told him when he is ready to come back and behave himself, why, all right; but he has got to come back reformed; that she couldn't live with him under the way he is going." On cross examination he testified: "I never liked Mike Fridae. * * * I have nothing to do with him."

Appellant's son Antone testified: "During the time they lived together, Mike was drunk most of the time. One day he tried to beat her. He said he was going to kill her with an ax." He further testified: "I didn't want him (appellee) there, not the way he was treating mother."

The evidence on the part of appellee consisted of his own testimony and the testimony of one Anthony Clock, the man who

was building the garage referred to. Clock testified that, during the time he was working on the garage, he ate his meals at the home of appellee and appellant; that on the day appellee left, he was eating his breakfast; that "Mrs. Fridne says to him that Mike will have to move, and if Mike don't move, his bones will be broken. I went out of the house then to build the garage; did not see anything after that; saw his clothes being pushed out on the porch; saw her push the things on the porch. Mike took them off the porch and went away."

Appellee testified that appellant, in discussing the matter of building the garage, said to him: "You are not going to be the boss here. You can't build the way you want it. You have to build it the way they want it (referring to her sons). * * * That was on Sunday. * * *Monday morning they all get up and boys, one of them go to school and one to work, and told me to get out of here, 'You will have to move, we don't want you here,' and then after the boys left then she come and told me ~~them~~ the same thing. She says, 'If you ain't going to get out I will break up your bones and throw you ~~out~~ out on the street and let you die like a dog.'"

Appellee further testified that he was sick with the flu at the time, and that appellant did not bring him anything to eat; that "on Wednesday I get up and go to look for a house; Thursday I told her I have got a house, she don't need to be worrying with me. She says, 'All right, get out,' and she take my clothes and shove them out. She says, 'You get out.'* * * I told her, I says if she want, she has got the place with me any time she wanted to. I am willing to live with her now if she agree to it. I am willing to support her." Appellant further testified that he never struck or beat his wife, that he never was drunk during their marriage, and that he gave his pay checks to appellant for the short time they lived together. Appellant in her testimony admitted that she did receive his checks, and that out of them she gave him ~~$10.00~~ $20.00.

The evidence is conflicting. If the testimony on the part of appellee and the witness Clock is to be believed, appellee was not guilty of deserting appellant. There are certain statements

was building the stage roller-by. Jack stopped work, hurried
over when he saw working in the stage, and ate his meal at the
home of squalor and squalid; what on the top superior left, he
was eating his dinner alone; what down. Where else to do, what the
will move to move, and if Ellie don't move, it's going will be broken.
I want out of his house then to build the stage, if not see hov-
ering over their, see his clothes being pushed out on the porch;
see her pack the things on the wagon. Like book from all we
porch and away."

Appalled to hitched were squalor, in slowly in his
matter of building the stage, said to him: "You are responsible to
be the boss here. You really build the stage, you work in. You have
to build it the way they want it (returning to her home). * *
Just see on Monday. * * Monday morning they all get up and
boys, one of them go to school and one to work, and then go to get
out of here, 'You will have to move, we don't want you around and
then after the boys left then the boss the told me there too more
thing. The boys, 'If you don't come to get out I will break up
your house and throw you out on the street and let you die like
a dog.'"

Appalled further repeated: "I said to Jack, 'Jack, you
him at the time, and that squalor will not allow his working it
out; what the edge of it get up and to look for a house;
Tuesday I told her I have got a house, we don't need to be
worrying with us." And now, 'Jack, get out, I am sick
of stories and make trouble. * * * Jack, get out.' * *
I told her, I don't if an house, we don't need to be worry any
time she want to. I am willing to live with her as it was
agreed to it. I am willing to support her, * * * Jack, I have
prohibited that he never allows me that my wife, and to take
the drunk during night morning, and he's gone in my house
[illegible] the house time they live with us. Squalor
is, she [illegible] house the old position [illegible], don't live
out of room and open his [illegible]

in appellant's testimony and in that of her sons which go in corroboration of the testimony of appellee to the effect that he did not willfully desert appellant, but that his going was at the instance of appellant and her sons.

Where a husband or wife leaves at the request or with the acquiescence of the other, he or she cannot be charged with a willful desertion, within the meaning of the statute. Loftus v. Loftus, 134 App. 360-362. The law further is that if a husband or wife voluntarily does that which compels the other to leave, or justifies the other in leaving, then such leaving would not be desertion on the part of the one leaving. French v. French, 302 Ill. 152-161. The evidence being conflicting, we would not be warranted in reversing the finding of the chancellor, unless we are able to say that it is against the manifest weight of the evidence. Calvert v. Carpenter, 96 Ill. 63-66-67; Hoffman v. Hoffman, 316 Ill. 204-214; Burandt v. Burandt, 318 Ill. 218-226; Springer v. David Bradley Mfg. Co., 191 App. 45-59; People, ex rel Hirsch, v. Nagel, 243 App. 490-496; That we cannot do.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

in appellant's testimony and in that of her none which go in corroboration of the testimony of appellee to the effect that he did not willfully desert appellant, but that his going was at the instance of appellant and her sons.

Where a husband or wife leaves at the request or with the acquiescence of the other, he or she cannot be charged with a willful desertion, within the meaning of the statute. Hoffus v. Hoffus, 164 App. 460-462. The law further is that if a husband or wife voluntarily does that which compels the other to leave, or justifies the other in leaving, that even leaving will not be desertion on the part of the one leaving. Prouse v. Prouse, 302 Ill. 182-184. The evidence below establishes, we think not be warranted in reversing the finding of the chancellor, unless we are made to say that it is against the manifest weight of the evidence. Malvert v. Carpenter, 94 Ill. 63-66-67; Hoffman v. Hoffman, 315 Ill. 464-466; Bennett v. Bennett, 213 Ill. 429-435; Springer v. Daniel Harris Mfg. Co., 183 App. 41-54; Smyle, ex rel Green, v. Smyle, 246 App. 430-434; that we cannot in not the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 1 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8137 Agenda 51

SARA P. McBURNIE, Appellee, :
-vs- : Appeal from the Circuit
RALPH N. BAILEY, Appellant. : Court of Peoria County

Boggs, P. J.

On June 21, 1929, judgment by confession was entered in the circuit court of Peoria County in favor of appellee and against appellant for $1,707.57. On July 16, being one of the regular days of the May term, 1929, a motion was entered by appellant to vacate said judgment, to stay execution and for leave to plead. Accompanying said motion was an affidavit, in which was stated, among other things:

"That the note sued on is a renewal note; that a former note was given by this defendant, Ralph N. Bailey, H. L. Emery and F. C. Cline, for the sum of $1,500; that at the time said note was given, it was distinctly understood and agreed that said Ralph N. Bailey should pay one-third of the principal and interest that might accrue upon the said note, and that the said H. L. Emery and the said F. C. Cline should each pay one-third of the said principal and the interest on the respective one-third of the original note"; that the same agreement obtained with reference to the note upon which judgment was taken, "that is to say, that each of them was to be individually liable for $500 of said $1,500 represented by the said note sued on, and the other two were to be security for the payment thereof, and that, individually, this affiant was only primarily liable for one-third of the said note and the interest that would accrue thereon."

It was also stated in said affidavit that, in addition to the 7% per annum interest provided for in said note, there was a bonus agreement entered into by the makers of said note with appellee, which, it is contended, rendered said note usurious.

Appellee admitted the usurious character of the transaction, and entered a remittitur of $195.07, reducing the

SARA P. McDONALD, appellee,	:	
	:	Appeal from the circuit
-vs-	:	
MARTIN R. MILLER, appellant.	:	Court of Scott County

Boggs, J. D.

On June 21, 1929, judgment by confession was entered in the circuit court of Scott County in favor of appellee and against appellant for $1,700.00. On July 15, being one of the regular days of the May term, 1929, a motion was entered by appellant to vacate said judgment, to stay execution and for leave to plead. Accompanying said motion was an affidavit, in which was stated, among other things:

"That one note sued on is a renewal note; that a former note was given by this defendant, Martin R. Miller, to Emery and R. D. Cline, for the sum of $1,000; that at the time said note was given, it was distinctly understood and agreed that said Martin R. Miller should pay one-third of the principal and interest that might accrue upon the said note, and that the said R. D. Emery and the said R. D. Cline should each pay one-third of the said principal and the interest on the respective one-third of the original note; that the same transaction [illegible] reference to the work upon which judgment was [illegible], that each of them was to be individually liable [illegible] $1,000 represented by the said note and, [illegible] to be security for the payment thereof, and that, relatively, this affiant was only primarily liable for two-thirds [illegible] note and the interest that could accrue thereon."

It was also stated in said affidavit that, in addition to the 7% per annum interest provided for in said note, there was a bonus agreement entered into by and among [illegible]

the amount of said judgment to $1,534.50. It being practically conceded that the remittitur covered all interest collected on the original note and the interest included in the judgment herein, the court refused to stay the execution and to vacate said judgment. To reverse said order or judgment, appellant prosecutes this appeal.

It is contended by appellant that the matters and things set forth in his affidavit showed a meritorious defense to said note, and that the court should have vacated said judgment and given appellant leave to plead. On the other hand, appellee insists that to have so ruled would have been to allow a defense, the effect of which would have been to vary, by parol evidence, the terms of a written instrument.

As a general proposition, it is well understood that the terms of a written instrument cannot be varied or changed by a prior or contemporaneous parol agreement. This rule obtains with reference to promissory notes as well as to other written contracts. Harris v. Galbraith, 45 Ill. 309-311; Mosher v. Rogers, 117 Ill. 446-453; Packer v. Roberts, 140Ill. 9-15; Mumford v. Tolman, 157 Ill. 258-265; Moyses v. Schendorf, 228 Ill. 232-233; Travelers Ins. Co. v. Mayo, 70 App. 627, affirmed in Travelers Ins. Co. v. Mayo, 170 Ill. 498; Hensley v. Mitchell, 147 App. 161-162; Western Hat Works v. Pride Hat Co., 224 App. 249-250.

For the <u>nisi prius</u> court to have opened up said judgment and given appellant leave to make the defense set forth in said affidavit, would have been to have varied the terms of said note. Under the foregoing authorities, the court did not err in denying said motion.

It might be further observed that, even if it be conceded that parol evidence of the character sought to be offered in this case were admissible, the showing made by the affidavit was not sufficient. In order to warrant the opening of a judgment by confession, for the purpose of allowing a defense to be made, the affidavit in support of the motion must show a meritorious defense. Desnoyers Shoe Co. v. First National Bank, 188 Ill. 312-319; Moyses v. Schendorf, supra 233; Chicago & M. E. Ry. Co. v. Krempel, 116 App. 253-256. The affidavit in this case states that"w hen said note was renewed by the giving of the note sued on,

the amount of said judgment to $1,584.30. It being practically conceded that the receiver covered all interest collected on the original note and the interest included in the judgment herein, the court refused to stay the execution and to vacate said judgment. To reverse said order or judgment, appellant prosecutes this appeal.

It is contended by appellant that the matters and things set forth in his affidavit showed a meritorious defense to said note, and that the court should have vacated said judgment and given appellant leave to plead. On the other hand, appellee insists that to have so ruled would have been to allow a defense, the effect of which would have been to vary, by parol evidence, the terms of a written instrument.

As a general proposition, it is well understood that the terms of a written instrument cannot be varied or changed by a prior or contemporaneous parol agreement. This rule obtains with reference to promissory notes as well as to other written contracts. Harris v. Gallbreth, 60 Ill. 304-311; Carter v. Rogers, 117 Ill. 446-450; Leeper v. Roberts, 140 Ill. 3-10; Morford v. Tolman, 187 Ill. 288-296; Moyses v. Schenkorr, 224 Ill. 284-289; Travelers Ins. Co. v. Mayo, 70 App. 247, affirmed in Travelers Ins. Co. v. Mayo, 170 Ill. 428; Tensley v. Mitchell, 147 App. 181-184; Western Nat. Bank v. Pride Nat. Co., 284 App. 440-450.

For the trial court to have opened up said judgment and given appellant leave to make the defense set forth in said affidavit, would have been to have varied the terms of said note. Under the foregoing authorities, the court did not err in denying said motion.

It might be further observed that, even if it be conceded that parol evidence of the character sought to be offered in this case were admissible, the showing made by the affidavit was not sufficient. In order to warrant the opening of a judgment by confession, for the purpose of allowing a defense to be made, the affidavit in support of the motion must show a meritorious defense. Donovera v. Co. v. First National Bank, 188 Ill.

that the same agreement in reference to the payment by each of the respective parties thereto was entered into, that is to say, that each of them was to be individually liable for $500 of said $1,500 represented by the note sued upon, and the other two were to be security for the payment thereof." The effect of said affidavit is to show a primary liability of appellant for one-third of said note and a liability as surety for the remaining two-thirds. It does not, therefore, show a meritorious defense.

Some question was also made by appellant as to the right of appellee to take judgment by confession against him, without joining the other makers of said note. The note sued on provides among other things: "Three months after date, I promise to pay to the order of Sara P. McBurnie," etc. The warrant of attorney to confess judgment on said note is as follows: "And to secure the payment of said amount each of the undersigned do jointly and severally, hereby irrevocably authorize any attorney of any court of record to appear for him," etc. Clearly, both in the promise to pay and in the warrant of attorney, the makers of said note were to be severally liable for the payment thereof. Persons severally liable upon a promissory note may all or any of them severally be included in the same suit, at the option of the plaintiff. Cahill's Ill. Stat., chap. 98, sec. 6; Glimes v. Ellars, 73 App. 553. All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable. Cahill's Ill. Stat., chap. 98, sec. 88. A promissory note executed by several, though joint in form, is joint and several, and the holder may resort to either of the makers for payment. Marine Bank of Chicago v. Ferry's Admrs., 40 Ill. 255.

In connection with the contention of appellant that the note in question is usurious, it is only necessary to say that, upon the remittitur above set forth having been made, the court would not have been warranted in opening up the judgment on account of the original ururious character of the transaction. Ralph v. Baxter, 66 Ill. 416.

Finding no error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

that the same agreement in reference to the payment by each of the respective parties thereto was entered into, that is to say, that each of them was to be individually liable for $500 of said $1,500 represented by the note sued upon, and the other two were to be security for the payment thereof." The effect of said affidavit is to show a primary liability of appellant for one-third of said note and a liability as surety for the remaining two-thirds. It does not, therefore, show a meritorious defense.

Some question was also made by appellant as to the right of appellee to take judgment by default against him, without joining the other makers of said note. The note sued on provides among other things: "[illegible] pay to the order of [illegible] warrant of attorney to confess judgment [illegible] the payment of said [illegible] jointly and severally, [illegible] of record [illegible] to pay [illegible] were to be severally [illegible] severally liable [illegible] ally [illegible] [illegible] 303. [illegible] denied [illegible] ment. [illegible] joint [illegible] to either of the makers [illegible] [illegible]

In [illegible] the note in question [illegible] and [illegible] would not have been [illegible] account of the original unknown [illegible] [illegible] Ill. 216.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 639

BE IT REMEMBERED, that afterwards, to-wit: On NOV 1 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8004 Agenda 21.

THE PEOPLE OF THE STATE OF ILLINOIS, DEFENDANT IN ERROR.	:	ERROR TO THE COUNTY COURT OF WINNEBAGO COUNTY.
V S.	:	
ROSIE WILLIAMS, PLAINTIFF IN ERROR	:	

Jett, J.

This cause comes to this court upon a writ of error, from the county court of Winnebago County. The same issue is involved in this cause as in People vs. San Filippo, General No. 7933, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

The people of the	:	
STATE OF ILLINOIS,	:	
DEFENDANT IN ERROR.	:	Error to the County
	:	
V.	:	Court of Cook County.
	:	
MATTIE WILLIAMS,	:	
PLAINTIFF IN ERROR	:	

Post, J.

This writ of error is to the court of a judgment of conviction from the county court of Cook County. The only issue is involved in this case is in regard to the ruling. General No. 7823, decided at the December term of this court. The opinion in that case controls the question in this case, and therefore the judgment of the trial court is reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 1 [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8043 Agenda 12.

THE PEOPLE OF THE STATE OF ILLINOIS, DEFENDANT IN ERROR.	:	ERROR TO THE COUNTY COURT OF WINNEBAGO COUNTY
V S.	:	
ALEX WHITE, PLAINTIFF IN ERROR.	:	

Jett. J.

This cause comes to this court upon a writ of error from the county court of Winnebago County. The same issue is involved as in People vs. San Filippo, General No. 7938, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

General Number 8043 Agenda 12.

THE PEOPLE OF THE STATE OF ILLINOIS, DEFENDANT IN ERROR.	:	ERROR TO THE COUNTY COURT OF WINNEBAGO COUNTY
V S.	:	
ALEX WHITE, PLAINTIFF IN ERROR.	:	

Left. J.

This cause comes to this court upon a writ of error from the county court of Winnebago County. The same issue is involved as in People vs. Dan Filippo, General No. 7938, decided at the present term of this court.

The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

255 I.A. 640 2

BE IT REMEMBERED, that afterwards, to-wit: On NOV 15 1929 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,	:	
vs.	:	WRIT OF ERROR TO COUNTY COURT OF WINNEBAGO COUNTY.
JOHN SCHMIDT, alias JOHN SMITH, Plaintiff in error,	:	

JONES J.

This cause comes to this Court upon writ of error from the County Court of Winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

LOUSTRIS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Appellate Court at Ottawa, this [illegible] day of [illegible] in the year of our Lord one thousand nine hundred and [illegible].

Clerk of the Appellate Court.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,	:	
vs.	:	WRIT OF ERROR TO COUNTY COURT OF WINNEBAGO COUNTY.
JOHN SCHMIDT, alias JOHN SMITH, Plaintiff in error,	:	

JONES J.

This cause comes to this Court upon writ of error from the County Court of Winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,	:	
	:	WRIT OF ERROR TO COUNTY COURT OF WINNEBAGO COUNTY.
vs.	:	
JOHN SCHMIDT, alias JOHN SMITH, Plaintiff in error,	:	

JONES J.

This cause comes to this Court upon writ of error from the County Court of Winnebago County. The same issue is involved as in People v. San Filippo, Gen. No. 7938, decided at the present term of this court. The opinion in that case controls the decision in this case, and therefore the judgment of the trial court is reversed.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On NOV 15 [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

SUSAN H. LEWIS, APPELLEE,	:	
vs.	:	APPEAL FROM THE CIRCUIT COURT OF HENRY COUNTY.
FARMERS' STATE BANK OF ATKINSON, ILLINOIS, a Corporation, et al, APPELLANTS,	:	

JONES P.J.

Susan H. Lewis filed a bill against Edward W. Lewis, her husband, to foreclose a deed of trust given by him to secure the payment of a note for $7,000. The bill alleged that default had been made in the payment of interest due in June, 1928; that there had been a failure to pay the taxes for the year, 1927, and that by reason of such defaults, complainant had elected to declare the entire debt due. It also alleged there are two senior encumbrances on the land amounting to $19,500; that the premises are not worth the amount of the encumbrances; that the debtor has only a life estate in eighty acres of the land and is 58 years of age; that his expectancy is of little value; that he is indebted more than $42,600 besides his debt to the complainant; that his personal property consisting of live stock, farm machinery, implements and growing crops has been levied on by the sheriff under executions in favor of judgment creditors for more than $23,000; that a part of said personaly property is mortgaged for $6,000; that the growing crops are in the custody of the sheriff, who has failed and neglected to properly care for them; that the personal property is not sufficient to satisfy the amount of the judgment and chattel mortgages; that the premises embraced in complainant's deed of trust are scant and insufficient security for her debt; that the debtor is hopelessly insolvent; and that the deed of trust provides that upon default by the grantor the trustee may take possession of the premises and collect all rents, issues, and profits. The bill also prayed for the appointment of a receiver.

SUSAN H. LEWIS, APPELLEE,	:
	:
vs.	: APPEAL FROM THE
	: CIRCUIT COURT OF
FARMERS' STATE BANK OF ATKINSON, ILLINOIS, a Cor- poration, et al, APPELLANTS,	: HENRY COUNTY.

JONES P.J.

Susan H. Lewis filed a bill against Edward W. Lewis, her husband, to foreclose a deed of trust given by him to secure the payment of a note for $7,000. The bill alleged that default had been made in the payment of interest due in June, 1928; that there had been a failure to pay the taxes for the year, 1927, and that by reason of such defaults, complainant had elected to declare the entire debt due. It also alleged there are two senior encumbrances on the land amounting to $19,000; that the premises are not worth the amount of the encumbrances; that the debtor has only a life estate in eighty acres of the land and is 38 years of age; that his expectancy is of little value; that he is indebted more than $42,000 besides his debt to the complainant; that his personal property consisting of live stock, farm machinery, implements and growing crops has been levied on by the sheriff under executions in favor of judgment creditors for more than $25,000; that a part of said personally property is mortgaged for $5,000; that the growing crops are in the custody of the sheriff, who has failed and neglected to properly care for them; that the personal property is not sufficient to satisfy the amount of the judgment and chattel mortgages; that the premises embraced in complainant's deed of trust are scant and insufficient security for her debt; that the debtor is hopelessly insolvent; and that the deed of trust provides that upon default by the grantor the trustee may take possession of the premises and collect all rents, issues, and profits. The bill also prayed for the appointment of a receiver.

Appellants who prosecute this appeal are the holders of judgments against the defendant, Edward W. Lewis. On July 27th, a hearing was had upon the verified written application for the appointment of a receiver. No notice of the hearing was given to the appellants, but they entered their appearance and were present when testimony was heard. It is conceded that the evidence tended to prove the allegations of the bill.

The court thereupon entered an order finding that Lewis is insolvent and has no property upon which there are not liens exceeding its value; that the first liens on the premises covered by complainant's trust deed amount to $19,600 with interest; and that there is now owing on complainant's trust deed, $7,000 and interest. The order finds that the premises are meager and scant security for the indebtedness, and that a receiver should be appointed to take charge of all crops and the premises, rent the land, care for and sell or dispose of the crops. A receiver was appointed and his bond fixed at $3,000.

This appeal is from the order appointing such receiver. The principal objection urged by appellants is that the order did not compel the complainant to give a bond to the defendants, conditioned to pay all damages sustained by reason of the appointment and acts of the receiver in case of a revocation of such appointment, or make a specific finding that no bond be required. Section 54 of the Chancery Act (Chap.22, Rev. Stat.) provides that before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the Court or Judge may order, provided, that bond need not be required, when for good cause shown, and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond.

It has been held that before a receiver can be appointed, a bond must be given by the complainant to the defendants, unless the order of the court appointing the receiver specifically finds that no such bond need be given. (Nat. Supply Co. v. Ill. Preserving Co., 239 Ill. App. 69; Ayres v. Graham S. C. & L. Co., 150 Ill. App. 137.) In the instant case, no bond was required

of judgments against the defendant, Edward W. Lewis. On July 27th, a hearing was had upon the verified written application for the appointment of a receiver. No notice of the hearing was given to the appellants, but they entered their appearance and were present when testimony was heard. It is conceded that the evidence tended to prove the allegations of the bill.

The court thereupon entered an order finding that Lewis is insolvent and has no property upon which there are not liens exceeding its value; that the first liens on the premises covered by complainant's trust deed amount to $12,000 with interest; and that there is now owing on complainant's trust deed, $7,000 and interest. The order finds that the premises are meager and scant security for the indebtedness, and that a receiver should be appointed to take charge of all crops and the premises, rent the land, care for and sell or dispose of the crops. A receiver was appointed and his bond fixed at $5,000.

This appeal is from the order appointing such receiver. The principal objection urged by appellants is that the order did not compel the complainant to give a bond to the defendants, conditioned to pay all damages sustained by reason of the appointment and acts of the receiver in case of a revocation of such appointment, or make a specific finding that no bond be required. Section 4a of the Chancery Act (Chap.22, Rev. Stat.) provides that before any receiver shall be appointed, the party making the application shall give bond to the adverse party in such penalty as the Court or Judge may order, provided, that bond need not be required, when for good cause shown, and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond.

It has been held that before a receiver can be appointed, a bond must be given by the complainant to the defendants, unless the order of the court appointing the receiver specifically finds that no such bond need be given. (Nat. Supply Co. v. Ill. Preserving Co., 239 Ill. App. 49; Ayres v. Graham S. C. M. Co., 150 Ill. App. 137.) In the instant case, no bond was required

of the complainant and the order appointing the receiver did not expressly dispense with the necessity of giving a bond.

The original order appointing a receiver was entered on July 27, 1928, one of the days of the June term, 1928, of the circuit court of Henry County. At the same term and on the 29th day of September, complainant filed a motion to amend the order and, as cause therefor, represented that on the day the original order was entered, a full hearing was had, at which the defendants (appellants here) were present and cross examined witnesses; that the court found that a receiver ought to be appointed without bond to the adverse party, but the finding that he should be so appointed without bond, was inadvertently omitted in the order signed by the Chancellor.

The Court thereupon entered an amended order which contains substantially the same findings and decretal orders as did the original order, and in additional thereto, included the following finding:

> "The Court further finds and is of the opinion that the crops, lands and improvements are being neglected, wasted and dissipated, and that it is for that and other good causes and for the interests of all parties to this proceeding, that a receiver be appointed to take charge of the lands, crops, issues and profits of said lands and properly care for the same and conserve the same; and the court is of the opinion for said reasons and other good reasons shown, that a receiver should be appointed without the complainant giving bond to said defendants or any of them."

The decretal portion of the amended order also contains the following:

> "It is further ordered that for good cause shown a receiver should be appointed without the complainant giving bond to the adverse party."

The Court had an undoubted right to so amend the original order appointing a receiver. It is a general rule that all decrees, no matter how final and conclusive in character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may be then amended, set aside, or vacated by that court. (Hawkins v. Taber, 47 Ill. 459; Court Rose v. Corna, 279 id. 605.)

When a decree fails to set out the court's findings,

of the complainant and the order appointing the receiver did not expressly dispense with the necessity of giving a bond.

The original order appointing a receiver was entered on July 27, 1928, one of the days of the June term, 1928, of the circuit court of Henry County. At the same term and on the 27th day of September, complainant filed a motion to amend the order and, as cause therefor, represented that on the day the original order was entered, a full hearing was had, at which the defendants (appellants here) were present and cross examined witnesses; that the court found that a receiver ought to be appointed without bond to the adverse party, but the finding that he should be so appointed without bond, was inadvertently omitted in the order signed by the Chancellor.

The court thereupon entered an amended order which contains substantially the same findings and decretal orders as did the original order, and in additional thereto, included the following finding:

> "The court further finds and is of the opinion that the crops, lands and improvements are being neglected, wasted and dissipated, and that it is for the and other good causes and for the interests of all parties to this proceeding, that a receiver be appointed to take charge of the lands, crops, leases and profits of said lands and properly care for the same and conserve the same; and the court is of the opinion for said reasons and other good reasons shown, that a receiver should be appointed without the complainant giving bond to said defendants or any of them."

The decretal portion of the amended order also contains the following:

> "It is further ordered that for good cause shown a receiver should be appointed without the complainant giving bond to the adverse party."

The court had an undoubted right to so amend the original order appointing a receiver. It is a general rule that all decrees, no matter how final and conclusive in character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may be then amended, set aside, or vacated by that court. (Hawkins v. Tabor, 47 Ill. App; Court Ross v. Crane, 279 id. 608.)

When a decree fails to set out the court's findings,

the chancellor in his discretion on motion of either party, may cause it to be amended to include the findings. (Bull v. International Power Co. 84 N.J. Eq. 209)

The original order appointing a receiver was erroneous in that it failed to require a bond or make specific findings obviating the necessity of such requirement, but the amende amended order cured the error. The record discloses that the receiver entered into bond on July 30, 1928, which date is prior to the date of the entry of the amended order. However, this circumstance is of little consequence, because the amendment relates back to the date of the aring original order. No question is raised as to the receiver's bond, and indeed none can be in this proceeding. His bond is separate and distinct from that required of the complainant. Should the chancellor feel that a new bond should be required of the receiver, he has authority to order it to be given. The question in this case pertains only to the bond required by statute to be given by the complainant, unless the necessity for giving it is obviated by a court finding to that effect.

It would be idle for this court on appeal to reverse an original decree because it contained an error which was cured by amendment at the same term the original order was entered. It would be equally useless to remand the cause for further action in reference to the appointment of a receiver because of a failure to comply with Sec. 54 of the Chancery Act, when the court by a subsequent order has already complied with it. The record justified the appointment of a receiver without bond, and the original order as amended became effective as of July 27, 1928. It contains sufficient specific findings and decretal orders to sanction the appointment of the receiver and obviate the necessity of the complainant's giving a bond to her adversary.

The order is therefore affirmed.

Order affirmed.

the chancellor in his discretion on motion of either party, may cause it to be amended to include the findings. (Bell v. International Power Co. 84 N.J. Eq. 209)

The original order appointing a receiver was erroneous in that it failed to require a bond or make specific findings obviating the necessity of such requirement, but the amended amended order cured the error. The record discloses that the receiver entered into bond on July 30, 1928, which date is prior to the date of the entry of the amended order. However, this circumstance is of little consequence, because the amendment relates back to the date of the entry original order. No question is raised as to the receiver's bond, and indeed none can be in this proceeding. His bond is separate and distinct from that required of the complainant. Should the chancellor feel that a new-bond should be required of the receiver, he has authority to order it to be given. The question in this case pertains only to the bond required by statute to be given by the complainant, unless the necessity for giving it is obviated by a court finding to that effect.

It would be idle for this court on appeal to reverse an original decree because it contained an error which was cured by amendment at the same term the original order was entered. It would be equally useless to remand the cause for further action in reference to the appointment of a receiver because of a failure to comply with sec. 5a of the Chancery act, when the court by a subsequent order has already complied with it. The record justified the appointment of a receiver without bond, and the original order as amended became effective as of July 27, 1928. It contains sufficient specific findings and decreed orders to sanction the appointment of the receiver and obviate the necessity of the complainant's giving a bond to her advantage.

The order is therefore affirmed.

Order affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Owen Anderson, Administrator of
the Estate of Everett Leland Lock,
deceased,

appellee,

vs.

Lee Myers and Raymond Myers,

appellants,

Appeal from the Circuit Court
of La Salle County.

Jones, J.

Plaintiff recovered a judgment against the defendants for $3000 as damages for the death of his intestate. On May 12th, 1921, William Myers, now deceased, was the owner of a tract of land lying along the east bank of the Vermillion River. Next to the river bank there was a narrow ledge eight of ten feet wide, and from the ledge, a steep cliff arose about fifty feet high. On top of the cliff was a comparatively level area of about 12 acres, on which were numerous stumps and stones. Three sons of William Myers, to-wit, Lee, also called Leo, Alfred, and Bartholomeo, entered into an arraggement with their father whereby said sons were to have the first year's corn crop from the 12 acrex tract in consideration of their services in removing rocks and stumps from the surface. Raymond Myers, a younger brother, assisted them in the work. At the time of the accident and for several days prior thereto, Lee and Raymond were engaged in clearing the land. In doing this work they would push stumps and rocks over the cliff and let them roll down onto the ledge or into the river.

On May 12, 1921, Milo Lock, aged 18 years, and his brother, Leonard Lock, aged 11 years, went fishing in the river. They took with them, Everett Leland Lock, plaintiff's intestate, aged five years and eight months. While Everett was sitting on the ledge, a large stone was rolled down the cliff striking and killing him.

The declaration has two counts. The first charges general negligence in connection with the rolling of the stone in question over the cliff, and the second charges wanton and wilful negligence on the part of the defendants.

Owen Anderson, Administrator of
the Estate of Everett Leland Lock,
deceased,

appellee,

vs.

Lee Myers and Raymond Myers,
appellants,

Appeal from the Circuit Court
of La Salle County.

Jones, J.

Plaintiff recovered a judgment against the defendants for $8000 as damages for the death of his intestate. On May 12th, 1921, William Myers, now deceased, was the owner of a tract of land lying along the east bank of the Vermillion River. Next to the river bank there was a narrow ledge eight of ten feet wide, and from the ledge, a steep cliff arose about fifty feet high. On top of the cliff was a comparatively level area of about 12 acres, on which were numerous stumps and stones. Three sons of William Myers, to-wit, Lee, also called Leo, Alfred, and Bartholomeo, entered into an arrangement with their father whereby said sons were to have the first year's corn crop from the 12 acres tract in consideration of their services in removing rocks and stumps from the surface. Raymond Myers, a younger brother, assisted them in the work. At the time of the accident and for several days prior thereto, Lee and Raymond were engaged in clearing the land. In doing this work they would push stumps and rocks over the cliff and let them roll down onto the ledge or into the river.

On May 12, 1921, Milo Lock, aged 18 years, and his brother, Leonard Lock, aged 11 years, went fishing in the river. They took with them, Everett Leland Lock, plaintiff's intestate, aged five years and eight months. While Everett was sitting on the ledge, a large stone was rolled down the cliff striking and killing him.

The declaration has two counts. The first charges general negligence in connection with the rolling of the stone in question over the cliff, and the second charges wanton and willful negligence on the part of the defendants.

The suit was instituted April 25, 1922, against the father, William Myers and his sons, Raymond and Lee. Raymond was then 18 years of age. No guardian ad litem was appointed to represent him. His father retained Thomas M. Haskins, a lawyer, to defend. Haskins caused his appearance to be noted as counsel for all defendants but filed no plea for any of them.

On March 12, 1923, the cause was continued on motion of the plaintiff and no further action was taken in it for more than four years. In the meantime, June, 1924, Haskins died. William Myers, the father, died June 4, 1925. It is stipulated that Haskin's death was known to the court and to counsel for plaintiff. On May 2, 1927, without any suggestion of Myer's death having been made of record, and without notice to the surviving defendants, a rule on all defendants to plead within five days was entered. Seven months later, on December 5, 1928, plaintiff suggested the death of William Myers, and without notice to the other defendants, a rule to plead instanter was entered against them. Thereupon, they were called and defaulted. A jury was impanelled, testimony on behalf of the plaintiff was heard, and a verdict for $5,000 was returned in his favor. Neither of the defendants was present nor represented by counsel. At the same term of Court and before judgment was rendered, they entered their motion, supported by affidavits to set aside the verdict and default and for leave to plead. Plaintiff then entered a remittitur of $2,000. The motion to set aside the verdict and for leave to plead was overruled and judgment was entered for $3,000.

Defendantsurge that the failure to appoint a guardian ad litem for Raymond Myers was error. When default was taken and judgment entered against him, he had reached his majority. The fact that he was an infant when the suit was instituted and that no guardian ad litem was appointed is immaterial, inasmuch as he became of age before any judgment was rendered against him. (In re Rousos, 119 N.Y.S. 34; Coffey v. Proctor Coal Co. 20 S.W. (Ky.) 286; Bernecker v. Miller 44 Mo. 102; Lancaster v. Barton, 92 W. Va. 615; 24 S.E. 251). After becoming of age, he was entitled to control and manage the litigation,

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On March 12, 1923, the cause was continued on motion of the plaintiff and no further action was taken in it for more than four years. In the meantime, June, 1924, Haskins died. William Myers, the father, died June 4, 1925. It is stipulated that Haskin's death was known to the court and to counsel for plaintiff. On May 2, 1927, without any suggestion of Myer's death having been made of record, and without notice to the surviving defendants, a rule on all defendants to plead within five days was entered. Seven months later, on December 5, 1928, plaintiff suggested the death of William Myers, and without notice to the other defendants, a rule to plead instanter was entered against them. Thereupon, they were called and defaulted. A jury was impanelled, testimony on behalf of the plaintiff was heard, and a verdict for $5,000 was returned in his favor. Neither of the defendants was present nor represented by counsel. At the same term of Court and before judgment was rendered, they entered their motion, supported by affidavits to set aside the verdict and default and for leave to plead. Plaintiff then entered a remittitur of $2,000. The motion to set aside the verdict and for leave to plead was overruled and judgment was entered for $3,000.

Defendants urge that the failure to appoint a guardian ad litem for Raymond Myers was error. When default was taken and judgment entered against him, he had reached his majority. The fact that he was an infant when the suit was instituted and that no guardian ad litem was appointed is immaterial, inasmuch as he became of age before any judgment was rendered against him. (In re Monroe, 119 N.Y.S. 34; Coffey v. Proctor Coal Co. 20 S.W. (Ky.) 286; Sarnecker v. Miller 44 Mo. 102; Lancaster v. Burton, 92 N. Va. 615; 2a C.J. 221). After becoming of age, he was entitled to control and manage the litigation,

and a guardian ad litem need not be appointed, although he was an infant at the commencement of the suit; in fact none should be appointed. (31 C.J. Infants 1133; In re Rousos, supra.)

It is insisted that it was error for the court to enter a rule on defendants to plead and to default them without notice. It is also urged that it was error to assess damages against them without notice. Rule 14 of the trial court is relied upon in support of the contention. That rule provided, "No motion will be heard or order made in any cause, except motions of course, without written notice thereof having been served upon the opposite party before four o'clock p.m. of the day preceding the day mentioned in the notice for calling such motion."

A motion of course is an application for an order which by some standing rule or practice of the court may be granted as a mere matter of routine without hearing both sides. A motion not of course, or a special motion as it is usually termed, is one which is not granted as a matter of course, but which the court in the exercise of its discretion may, on the facts established in support of the application, either grant or refuse. Special motions are those which involve the discretion or judgment of the court and must be heard and considered. They are motions granted after hearing had. (14 Encyc. P. and Pr. 93-9; 42 C.J. Motions and Orders, 466; Stanton v. Kinsey, 151 Ill. 301.) We are of the opinion that motions for a rule to plead are motions of course and are excluded from the rule by its terms. Upon the expiration of the rule, parties not complying therewith are in default. No error is assigned covering the assessment of damages without notice and therefore that question cannot be considered by the court.

The record discloses that the cause was continued from time to time over a period of 5½ years, a large part of which time was during the minority of Raymond Myers. After the death of Mr. Haskins, no attorney appeared for any of the defendants, His death was known to the court and plaintiff's counsel. William Myers, the father, also died. No rule to plead was entered during the lifetime of Haskins or of William Myers, and no rule was entered or other step taken by plaintiff until about three years

and a guardian ad litem need not be appointed, although he was an infant at the commencement of the suit; in fact none should be appointed. (31 C.J. Infants 1122; In re Hobson, supra.)

It is insisted that it was error for the court to enter a rule on defendants to plead and to default them without notice. It is also urged that it was error to assess damages against them without notice. Rule 14 of the trial court is relied upon in support of the contention. The rule provided, "No motion will be heard or order made in any cause, except motions of course, without written notice thereof having been served upon the opposite party before four o'clock p.m. of the day preceding the day mentioned in the notice for calling such motion."

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The record discloses that the cause was continued from time to time over a period of 5½ years, a large part of which time was during the minority of Raymond Myers. After the death of Mr. Hawkins, no attorney appeared for any of the defendants, his death was known to the court and plaintiff's counsel. William Myers, the father, also died. No rule to plead was entered during the lifetime of Hawkins or of William Myers, and no rule was entered or other step taken by plaintiff until about three years

after the death of Haskins and two years after the death of William Myers.

The education of the sons was meager. Raymond had attended a country school up to the 6th grade and Lee had attended up to the 7th grade. Their affidavits in support of the motion to set aside the verdict and for leave to plead recite that a short time after this suit was instituted, they were told by their father that it had been dismissed and would never be brought to trial. It is evident that they did not know the suit was pending against them.

Under the circumstances, the defendants were entitled to make their defense and it was error to refuse to set aside the verdict and default. The judgment is reversed and the cause remanded with directions to set aside the verdict and default and to permit appellants to plead to the declaration.

We express no opinion at this time as to the sufficiency of the evidence in support of plaintiff's case.

Reversed and remanded with directions.

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Under the circumstances, the defendants were entitled to make their defense and it was error to refuse to set aside the verdict and default. The judgment is reversed and the cause remanded with directions to set aside the verdict and default and to permit appellants to plead to the declaration.

We express no opinion at this time as to the sufficiency of the evidence in support of plaintiff's case.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8118 Agenda No. 22

In The

APPELLATE COURT OF ILLINOIS

Second District

--

October Term, A. D., 1929.

--

F. H. Borm, Appellee, vs. Aurora, Elgin and Fox River Electric Company, a Corporation, Appellant.	)	Appeal from Circuit Court of Kane County.

--

OPINION by BOGGS, P. J.

--

An action on the case was instituted by appellee against appellant in the Circuit Court of Kane County to recover damages alleged to have been caused through negligence on the part of appellant.

The declaration originally consisted of five counts, but the cause was tried on the first count and plea of not guilty. A verdict was rendered in favor of appellee assessing his damages at $207.35 and judgment was rendered thereon. To reverse said judgment this appeal is prosecuted.

The accident in question occurred in the city of Elgin on April 19, 1928. Douglas avenue in said city runs in a northerly and southerly direction, and is a paved street forty-two feet wide from curb to curb. In the center of said street is the track of appellant company. Kimball street runs in an easterly and westerly direction, crossing Douglas avenue at right angles. North street, an east and west street, crosses Douglas avenue one block south of Kimball. On the east side of Douglas avenue is located the L. E. Cropp Garage. The

General No. 8118 Agenda No. 22

In The

APPELLATE COURT OF ILLINOIS

Second District

October Term, A. D., 1929.

E. K. Sorm,

Appellee,

vs.

Aurora, Elgin and Fox River Electric Company, a Corporation,

Appellant.

Appeal from Circuit Court of Kane County.

OPINION by DODGE, P. J.

An action on the case was instituted by appellee against appellant in the Circuit Court of Kane County to recover damages alleged to have been caused through negligence on the part of appellant.

The declaration originally consisted of five counts, but the cause was tried on the first count and plea of not guilty. A verdict was rendered in favor of appellee assessing his damages at $207.55 and judgment was rendered thereon. To reverse said judgment this appeal is prosecuted.

The accident in question occurred in the city of Elgin on April 19, 1928. Douglas avenue in said city runs in a northerly and southerly direction, and is a paved street forty-two feet wide from curb to curb. In the center of said street is the track of appellant company. Kimball street runs in an easterly and westerly direction, crossing Douglas avenue at right angles. North street, an east and west street, crosses Douglas avenue one block north of Kimball. On the east side of Douglas avenue is located the L. F. Stopp Garage. The

center line of the driveway of Cropp's Garage is about 110 feet south of the south curb of Kimball street.

At a point in Douglas avenue, 180 feet south of Cropp's Garage is located a switching track running south from said point. Just opposite said garage the collision in question occurred.

It is first contended for a reversal of said judgment that the evidence fails to show due care on the part of appellee, and that that was a matter for affirmative proof on his part. Appellee testified:

"At about 11:00 o'clock or 11:30 on April 19, 1928, the weather was clear and I was driving my four passenger Buick coupe west on North street and had turned off North street on Douglas avenue, going to the Cropp Garage.

"I drove up Douglas avenue partly--pretty close to the center of the street, east of the track there. On the way up and as I was going to turn there, I noticed there was an automobile following me, and I proceeded and slowed up to a stop to make the turn into the Cropp Garage. The front end of my car was south of the entrance about four or five feet. I was very close to the east rail of the street-car track, about a foot from the track. I paused for a moment to see what the car behind me was doing, but previous to that I looked ahead and I saw a street car that appeared--it was at the far end of the next block, I would say about 400 or 450 feet north in Douglas avenue. I first saw that car as I was about to stop in front of the Cropp Garage. The automobile behind passed to my left. I proceeded to shift the gears and turn into the garage door. At that moment the car struck me." Appellee further testified that after said collision appellant's car was at the switch track about 200 feet from his automobile. On cross examination appellee testified that when he first saw appellant's car it was about three hundred or three hundred and fifty feet north of the south line of Kimball street; that there was an electric light at Kimball street and that at that point appellant's car was being operated

center line of the driveway of Dropp's Garage in about 110 feet south of the south curb of Kimball street.

At a point in Douglas avenue, 180 feet south of Dropp's Garage is located a switching track running south from said point. Just opposite said garage the collision in question occurred.

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at about forty miles per hour. He was then asked, "Did you look at it again?" He answered, "I did not have much time to look at it. * * * I was just getting under headway to get over to the garage." The record discloses that the left side of appellee's car, front and back were injured by the collision. Appellee is corroborated as to the location of his car just prior to the time of the collision by one of the men working in said garage. Two police officers testified that after said collision appellee's car was standing parallel to appellant's track about six inches east of the east rail. He is also corroborated by several witnesses as to the location of appellant's car after said collision, namely that it was about 180 feet south of the said garage. Appellee and A. R. Edwards, appellant's motorman were the only eye witnesses to the collision. Edwards testified:

"The accident happened just right at the south corner, at the driveway; right this side of Cropp's Garage.

"My speed was around ten miles an hour when the accident actually occurred. * * * * * * * * * * * * * * * *

"I was up about at Kimball and he was down about at North. We was going to meet one another and I was on the east side of the track, that is the right side and he was coming on down. * * * * He continued in the same path up till about ten feet of me and all of a sudden he turned right over to the track. *******When he first made the turn he was, I should judge, about three or four feet from that track, when he first made the turn to the track, and then the collision occurred. * * * * I had made an application of air at the time when I saw him turn out to the track and had slowed my car down for the switch. * * When I saw that the collision was going to happen, I jumped up and let loose of the controls and stepped back out of the way because of the glass in front of me. By stepping back the emergency brake was automatically applied and it stopped the car. The last I saw of the automobile before the collision it was about ten feet away. It was moving at about the same rate

at about forty miles per hour. He was then asked, "Did you look at it again?" He answered, "I did not have much time to look at it. * * * I was just getting under roadway to get over to the garage." The record discloses that the left side of appellee's car, front and back were injured by the collision. Appellee is corroborated as to the location of his car just prior to the time of the collision by one of the men working in said garage. Two police officers testified that after said collision appellee's car was standing parallel to appellant's track about six inches east of the east rail. He is also corroborated by several witnesses as to the location of appellant's car after said collision, namely that it was about 180 feet south of the said garage. Appellee and A. R. Edwards, appellant's motorman were the only eye witnesses to the collision. Edwards testified:

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of speed that I was, about twelve or fifteen miles an hour. The accident occurred at the south line of the driveway and my car came to a stop about forty or fifty feet north of the switch point."

This witness further testified that operating appellant's car when the street was dry at a rate of 15 miles per hour it could be stopped in about 60 or 70 feet. Appellant's General Manager testified that it would probably take about 150 to 155 feet to stop the car when it was running 15 miles per hour.

The foregoing in substance is the testimony with reference to how the collision occurred.

In Lang v. Chicago Railways Co., 181 Ill. App. 654-656. The driver of a team of horses turned across the tracks of the street car company in the path of an oncoming car. At the time the driver so attempted to cross, the car was some considerable distance up the track. The rear end of the driver's wagon was struck and the driver was injured. The court held that it was a question of fact for the jury as to whether the driver of said ~~tema~~ team was guilty of contributory negligence.

We are of the opinion and hold that on the record in this case we would not be justified in holding as a matter of law that appellee was guilty of contributory negligence. Chicago & J. E. Ry. Co. v. Wanic, 230 Ill. 530-535. Chicago & N. W. Ry. Co. v. Hansen, 166 Ill. 625-629.

It is next insisted that the court erred in permitting two of the policemen of said city to testify as to what appellant's motorman said at the street car barns a few minutes after said collision.

We are of the opinion that the court erred in admitting said testimony. However, the testimony of said motorman on behalf of appellant was in substance very much to the same effect as the testimony objected to. We would not therefore be justified in reversing said judgment on account of the ruling of the

of speed that I was, about twelve or fifteen miles an hour. The accident occurred at the south line of the driveway and my car came to a stop about forty or fifty feet north of the switch point."

This witness further testified that operating appellant's car when the street was dry at a rate of 15 miles per hour it could be stopped in about 50 or 70 feet. Appellant's General Manager testified that it would probably take about 150 to 165 feet to stop the car when it was running 15 miles per hour.

The foregoing in substance is the testimony with reference to how the collision occurred.

In Lang v. Chicago Railways Co., 181 Ill. App. 654-656. The driver of a team of horses turned across the tracks of the street car company in the path of an oncoming car. At the time the driver attempted to cross, the car was some considerable distance up the track. The rear end of the driver's wagon was struck and the driver was injured. The court held that it was a question of fact for the jury as to whether the driver of said team was guilty of contributory negligence.

We are of the opinion and hold that on the record in this case we would not be justified in holding as a matter of law that appellee was guilty of contributory negligence. Chicago & I. R. Ry. Co. v. Wantz, 100 Ill. 380-382. Chicago & N. W. Ry. Co. v. Hansen, 100 Ill. 618-619.

It is next insisted that the court erred in permitting two of the policemen of said city to testify as to what appellant's motorman said at the street car within a few minutes after said collision.

We are of the opinion that the court erred in admitting said testimony. However, the testimony of said witnesses on behalf of appellant was in substance very much to the same effect as the testimony objected to. We would not therefore be justified in reversing said judgment on account of the admission of the

court on admission of said testimony. Weinberger v. McDonough, 98 Ill. App. 441-445. Gruver v. City of Dixon, 85 Ill. App. 79-81. It is also insisted that the court erred in giving the following instruction on behalf of appellee: "You are further instructed that, while as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor."

The giving of this instruction has been approved by the Supreme Court in Hanchett v. Haas, 219 Ill. 546-548. Taylor v. Felsing, 164 Ill. 331-336. Chicago City Ry. Co. v. Bundy, 210 Ill. 39-48. In the more recent cases the Supreme Court has criticized the giving of instructions of this character but has never so far as we have found held that in and of itself the giving of this instruction constituted reversible error. While we do not approve of the giving of this instruction we would not be warranted in reversing the judgment on account thereof. Watts v. Wabash Railway Co., 219 Ill. App. 549-556.

It is also insisted that the court erred in refusing appellant's instruction No. 20. In so far as this instruction states correct principles of law it was covered by other given instructions. The court did not err in refusing said instruction. Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

court on admission of said testimony. Weinberger v. McDonough, 90 Ill. App. 441-445. Grover v. City of Dixon, 85 Ill. App. 79-81. It is also contended that the court erred in giving the following instruction on behalf of appellee: "You are further instructed that, while as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find the issues in his favor."

The giving of this instruction has been approved by the Supreme Court in Hammett v. Hess, 213 Ill. 362-366. Taylor v. Terminal Ice Ill. 361-366. Chicago City Ry. Co. v. Brady, 213 Ill. 39-46. In the more recent cases the Supreme Court has criticised the giving of instructions of this character but has never so far as we have found held that in and of itself the giving of this instruction constituted reversible error. While we do not approve of the giving of this instruction we would not be warranted in reversing the judgment on account thereof. Watts v. Wabash Railway Co., 219 Ill. App. 522-526.

It is also contended that the court erred in refusing appellant's instruction No. 5. In so far as this instruction states correct principles of law it was covered by other given instructions. The court did not err in refusing said instruction. Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

86a

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8133 Agenda No. 31.

EMMETT HASTINGS, Appellee	)	Appeal from Circuit Court, Lake County.
vs.	)	
ABLE TRANSFER COMPANY, a corporation, Appellant.	)	

Boggs, P. J.,

On September 21, 1928, between 11:00 and 11:30 P. M., Appellee was driving south on State Route 21. A short distance north of the town of Lake Villa his automobile collided with the rear end of a truck belonging to appellant, driven by one Edward Shaller. Appellee was injured and his automobile was damaged as a result of said collision. To recover therefor, this action was instituted in the circuit court of Lake County.

The declaration originally consisted of four counts. The second and fourth counts were withdrawn or abandoned by appellee, and the cause went to trial on the first and third counts, to which appellant filed a plea of not guilty and a plea denying the ownership or control of said truck. During the trial, the plea denying ownership was withdrawn. The first count of the declaration is based on a charge of general negligence. The third count is based on an alleged violation of the following Statute:

"When upon any public highway in this state during the period from one hour after sunset to sunrise, every motor bicycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 200 feet in the direction towards which such motor bicycle or motor vehicle is proceeding and each motor vehicle or trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction."

General No. 8188 Agenda No. 1.

ROBERT HASTINGS, Appellee, vs. ARMY TRANSFER COMPANY, a corporation, Appellant.	Appeal from Circuit Court, Lake County.

Boggs, P. J.:

On September 21, 1928, between 11:00 and 11:30 P. M., appellee was driving north on State route 21. A short distance north of the town of Lake Villa his automobile collided with the rear end of a truck belonging to appellant, driven by one Edward Sailer. Appellee was injured and his automobile was damaged as a result of said collision. To recover therefor, this action was instituted in the circuit court of Lake County.

The declaration originally consisted of four counts. The second and fourth counts were withdrawn or abandoned by appellee, and the cause went to trial on the first and third counts, to which appellant filed a plea of not guilty and a plea denying the ownership or control of said truck. During the trial, the plea denying ownership was withdrawn. The first count of the declaration is based on a charge of general negligence. The third count is based on an alleged violation of the following statute:

"When upon any public highway in this state during the period from one hour after sunset to sunrise, every motor bicycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 200 feet in the direction towards which such motor bicycle or motor vehicle is proceeding; and each motor vehicle or trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction."

A trial was had, resulting in a verdict and judgment in favor of appellant for $800. To reverse said judgment, this appeal is prosecuted.

One of the grounds urged for a reversal of said judgment is that the court erred in denying the motion made by appellant at the close of appellee's evidence and again at the close of all the evidence, to direct a verdict in favor ~~fx~~ of appellant. It is only necessary to say that, taking the evidence in its most favorable aspect in connection with appellee's case, it fairly tends to prove the averments of his declaration. This being true, the court did not err in refusing to direct a verdict.

It is also contended that the verdict is against the manifest weight of the evidence. In this connection, it is strenuously insisted that appellee was guilty of contributory negligence, in failing to have his bright lights on just prior to and at the time of said collision.

Appellee testified that he did not have on his bright lights, but had on his dimmer headlights. He also testified that at the time of the collision he was driving twenty-five miles per hour; that he did not see appellant's truck until he was unable to avoid the collision. He further testified that appellant's truck had no light of any kind on the rear, and that "at the moment when I was two or three feet in back of this truck or just a moment prior thereto, there were machines going in the opposite direction, with lights."

On cross examination, appellee testified: "I could not see how far away the lights of the closest car were immediately prior to the time I ran into the truck. There were cars going along, one after the other." He also testified that "at that time (referring to the time of the collision), the truck, I think, was pretty well toward the center of the road."

Three witnesses on behalf of appellee testified that they had been serving as police officers or deputy sheriffs at a boxing match that had been held at Antioch, a few miles north of where

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It is also contended that the verdict is against the manifest weight of the evidence. In this connection, it is strenuously insisted that appellee was guilty of contributory negligence, in failing to have his bright lights on just prior to and at the time of said collision.

Appellee testified that he did not have on his bright lights, but had on his dimmer headlights. He also testified that at the time of the collision he was driving twenty-five miles per hour; that he did not see appellant's truck until he was unable to avoid the collision. He further testified that appellant's truck had no light of any kind on the rear, and that "at the moment when I was two or three feet in back of this truck or just a moment prior thereto, there were vehicles going in the opposite direction, with lights."

On cross examination, appellee testified: "I could not see how far away the lights of the closest car were immediately prior to the time I ran into the truck. There were cars going along, one after the other." He also testified that "at that time (referring to the time of the collision), the truck, I think, was pretty well toward the center of the road."

Three witnesses on behalf of appellee testified that they had been serving as police officers or deputy sheriffs at a boxing match that had been held at Antioch, a few miles north of where

the collision occurred; that they left Antioch about two minutes after appellee, and that they arrived at the place of the collision very shortly after it occurred; that they saw the lantern in question and it was not lit; that they felt of the globe and that it was cold. Certain of said officers also testified that the globe was smoked. Appellant's driver admitted that it was smoked to some extent.

Shaller, the driver of appellant's truck testified that the rear light on said truck was not working; that his foreman or boss had borrowed a lantern and had tied the same to a stake at the rear of the truck, near the left side; that the lantern was burning just prior to the collision; that he had a mirror near the driver's seat, which disclosed that fact.

Appellee's testimony that said truck was not on the right of the center of said pavement, is corroborated by the two of the police officers above mentioned. Quendt testified: "With reference to the center of the road, the left rear wheel was a trifle over the black line." Klarkowski testified: "The truck was standing over the black line. I could not say how far over. It was over on the left hand side as he was going south, on the wrong side of the road."

Appellee was further corroborated in his testimony that there was no light on the rear of said truck, by one Marvin Johnson. This witness testified that on the evening in question he had been at Antioch and left there between 11:00 and 11:30, going south on Route 21. He was asked: "Did you that evening, while headed south on Route 21, have occasion to see a large truck driven south on Route 21?" This question was objected to, the objection was overruled and he answered, "Yes." He was then asked: "Was there any other truck on that road within a period, say from the time you left the Antioch Palace until after you left this truck, if you did leave it, that evening?" This question was objected to, the objection was overruled, and he answered, "No." He further testified: "I first saw the truck on Route 21 just as I crossed the St. Paul tracks. It was about 200 feet south of the track. I had already

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passed the track. The first time I saw this truck, it was about 20 or 25 feet away from my machine. We were going about 35 or 40 miles an hour at the time. I did not observe any lights on the rear of this truck. I did not observe any red light. I did not observe any white light. As I suddenly found this truck in front of me I was going on a 45-drgree angle that turns there. When you get across the track, you shoot straight south again. When I swung back to the right side of the road, my lights hit the truck."

Appellee testified that, at the time of the collision, appellant's truck was not moving. Shaller testified that as he was proceeding south he had had trouble with his engine; that he was running about five miles per hour, as he expressed it, " was babying it along"; that at times the engine would get hot and that he would have to stop until it would cook off.

The foregoing in substance is the testimony with reference to how the collision occurred. Counsel for appellant, in support of his contention, that appellee was guilty of contributory negligence as a matter of law, cites Johnson v. Gustafson, 233 App. 216, and Sugru v. Highland Park Yellow Cab Co., 251 App. 99. In Johnson v. Gustafson, supra, the appellate court of the first district, and in the latter case, this court held in effect that the provision of said statute with reference to headlights was for the purpose of assisting the driver to observe what is ahead of him, as well as a warning or notice to cars or persons coming from the opposite direction.

While recognizing the principle laid down in these cases, we must also keep in mind the provision of the statute which requires the driver of an automobile, in meeting other cars to dim or extinguish his bright lights when within 250 feet of the oncoming vehicle.

The questions of negligence, contributory negligence and the proximate cause of an injury are questions of fact which should be left to the jury to determine. Milauskis v. Terminal R. R. Assn, 286 Ill/ 547-557; Elgin, J. & E. R. Co. v. Thomas, 215 Ill. 158-161; Wabash R. Co. v. Brown, 152 Ill. 484-488; Bux v. Illinois C. R.

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Co., 229 App. 50-54.

In this case, it was a question of fact for the jury as to whether appellee, in not having his bright lights turned on, was guilty of negligence contributing to said collision. The jury were fully warranted in finding as they did, that appellee was not so negligent.

It is next insisted that the court erred in its ruling on the two questions above set forth, propounded to the witness Johnson. No objection was made that these questions were leading or suggestive. The objection was general. Said testimony was competent as tending to show that the truck this witness saw was appellant's truck, and that the same, at the time he saw it, did not have a tail light of any character. However that may be, this witness testified at considerable length on direct examination, without objection, with reference to this truck. On cross examination, counsel for appellant went into the transaction quite fully, developing in more detail all of the facts and circumstances testified to by this witness. We therefore hold that appellant is not in a position to seriously question the ruling of the court in this connection.

It is next insisted that the evidence fails to show negligence on the part of the driver of appellant's truck. It is insisted that, while the tail light on said truck was not burning, the lantern in question, which the driver of said truck testified was lighted, was a sufficient compliance with said statute.

It is only necessary to say that the preponderance of the evidence is to the effect that no light of any character was displayed at the rear of said truck.

It is next insisted that the court erred in its rulings on the instructions. Five instructions were given on the part of appellee and twelve on the part of appellant. It is insisted that the second, third and fourth instructions on behalf of appellee were erroneous.

As to appellee's second instruction, it is contended that the court erroneously stated to the jury that failure to have a

Co., 229 App. 80-84.

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It is only necessary to say that the preponderance of the evidence is to the effect that no light of any character was displayed at the rear of said truck.

It is next insisted that the court erred in its rulings on the instructions. Five instructions were given on the part of appellee and twelve on the part of appellant. It is insisted that the second, third and fourth instructions on behalf of appellee were erroneous.

As to appellee's second instruction, it is contended that the court erroneously stated to the jury that failure to have a

red light exhibited from the rear of said truck was negligent. What said instruction in effect told the jury was, that if such light was not exhibited and if the failure to so exhibit said light proximately caused the damage in question, then appellant was negligent.

It is also insisted as to this instruction that it does not correctly set forth the care to be exercised by appellee. Said instruction refers to the care required of appellee as "reasonable under the circumstances." The instruction does not correctly define the care required of appellee, as it should have been "due care", or "ordinary care". However, appellant's second given instruction contains the same language. Appellant is, therefore, not in a position to urge this objection.

Said instruction is also criticized because it sets forth certain provisions of section 17, chapter 95 a of Cahill's Statutes, with reference to the character of lights, etc., which automobiles should be equipped with, the contention being that said instruction lays undue emphasis on the character of rear light an automobile should be provided with. Appellant's fifth given instruction contains the same quotation from said statute. It is therefore not in a position to urge this objection.

Appellee's third and fourth given instructions are as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff has proven his case by a preponderance or a greater weight of the evidence, then the plaintiff is entitled to recover, and you should find the defendant guilty."

"The Court instructs the jury that if you believe from the evidence that the defendant negligently failed to provide a red lighted rear lamp on his truck and that such negligent failure so to provide resulted in damage to the plaintiff while the plaintiff was in the exercise of due care for his own safety, then you should find the defendant guilty."

It is insisted against instruction no. 3 that it fails to limit the right of recovery to the charges of negligence set

red light exhibited from the rear of said truck was negligent. That said instruction in effect told the jury was, that if such light was not exhibited and if the failure to so exhibit said light proximately caused the damage in question, then appellant was negligent.

It is also insisted as to this instruction that it does not correctly set forth the care to be exercised by appellee. Said instruction refers to the care required of appellee as "reasonable under the circumstances." The instruction does not correctly define the care required of appellee, as it should have been "the care", or "ordinary care". However, appellant's second given instruction contains the same language. Appellant is, therefore, not in a position to urge this objection.

Said instruction is also criticized because it sets forth certain provisions of section IV, chapter 95 a of Smith's Statutes, with reference to the character of lights, etc., which automobiles should be equipped with, the contention being that said instruction lays undue emphasis on the character of rear light an automobile should be provided with. Appellant's fifth given instruction contains the same quotation from said statute. It is therefore not in a position to urge this objection.

Appellee's third and fourth given instructions are as follows:

"The Court instructs the jury that if you believe from the evidence that the plaintiff has proven his case by a preponderance or a greater weight of the evidence, then the plaintiff is entitled to recover, and you should find the defendant guilty."

"The Court instructs the jury that if you believe from the evidence that the defendant negligently failed to provide a red lighted rear lamp on his truck and that such negligent failure so to provide resulted in damage to the plaintiff while the plaintiff was in the exercise of due care for his own safety, then you should find the defendant guilty."

It is insisted against instruction no. 3 that it tends to limit the right of recovery to the charges of negligence set

forth in the declaration. There was no conflict in the evidence with reference to the negligence charged. This objection is not well taken.

The same objection is made to the fourth instruction, and also that it over-emphasizes the importance of the absent red light. There is no merit in this contention. The court did not err in giving said instruction.

It is also insisted that the court erred in refusing appellant's sixth refused instruction. An examination of this instruction discloses that it is the same as appellant's first given instruction, word for word, except that the refused instruction includes the language "as charged in plaintiff's declaration." Apellant having seen fit to offer two instructions of practically the same character, it is not in a position to complain that the court may have given the instruction which appellant deems less favorable to it. Thompson v. Duff, 119 Ill. 226-227; Korn v. Chicago Ry. Co., 271 Ill. 329-335; Sullivan v. Ohlhaver Co., 291 Ill. 359-363.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

forth in the declaration. There was no conflict in the evidence with reference to the negligence charge. This objection is not well taken.

The same objection is made to the fourth instruction, and also that it over-emphasizes the importance of the absent red light. There is no merit in this contention. The court did not err in giving said instruction.

It is also insisted that the court erred in refusing appellant's sixth refused instruction. An examination of this instruction discloses that it is the same as appellant's first given instruction, word for word, except that the refused instruction includes the language "as charged in plaintiff's declaration." Appellant having seen fit to offer two instructions of practically the same character, it is not in a position to complain that the court may have given the instruction which appellant deems less favorable to it. Thompson v. Duff, 119 Ill. 226-227; Korn v. Chicago Ry. Co., 271 Ill. 329-330; Sullivan v. Chinaver Co., 281 Ill. 589-590.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8148 Agenda No. 40

In the Appellate Court of Illinois

Second District

October Term, A.D. 1929.

Nic Wetzel, appellee, vs. Fred K. Nimpfer, appellant,	Appeal from the Circuit Court of Lake County.

Opinion by Boggs, P. J.

An action in assumpsit was instituted by appellee against in the circuit court of Lake County. The declaration consisted of the common counts, accompanied by an affidavit of claim. To said declaration a plea of the general issue was filed by appellant. A trial was had, resulting in a verdict and judgment in favor of appellee for $3,249.00. To reverse said judgment, this appeal is prosecuted.

On October 5, 1929, a motion was made by appellee in this court to strike the bill of exceptions from the files, on the ground that the same had not been filed within the time fixed by the court. The record discloses that said judgment was entered on April 6, 1929, being one of the regular days of the March term of said court. An appeal was prayed by appellant. The court entered an order allowing said appeal, upon filing bond within thirty days and a bill of exceptions within ninety days. The time for filing the bill of exceptions, by its terms, expired on July 6, 1929. While it is conceded that the bill of exceptions was not filed within the time originally fixed, appellant insists that, on September 10, 1929, at a special May term, an order was entered extending the time for the filing of said bill of exceptions to that date; that, pursuant to said order, said bill of exceptions was filed.

A trial court has jurisdiction to extend the time for

General No. 8148 Agenda No. 40

In the Appellate Court of Illinois

Second District

October Term, A.D. 1929.

Nic Wetzel, appellee, va. Fred K. Nimpier, appellant,	Appeal from the Circuit Court of Lake County.

Opinion by Dogge, J. d.

An action in assumpsit was instituted by appellee against in the circuit court of Lake County. The declaration consisted of the common counts, accompanied by an affidavit of claim. To said declaration a plea of the general issue was filed by appellant. A trial was had, resulting in a verdict and judgment in favor of appellee for $3,248.00. To reverse said judgment, this appeal is prosecuted.

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A trial court has jurisdiction to extend the time for

filing a bill of exceptions, either at the term at which the judgment was entered or at a subsequent term. Richter v. C. & E. R.R. Co., 273 Ill. 625-627; Foley v. Boyer, 153 App, 613-615. However, the order extending such time, if made at a succeeding term, must be entered prior to the expiration of the time originally fixed. Shults v. Shults, 229 Ill. 428-429; Richter v. C. & E. R. R. Co., supra; Foley v. Boyer, supra. In this case, the time was not extended during the March term. It does not purport to have been extended at the May term until after the time originally fixed for the filing of said bill of exceptions had expired. Said bill of exceptions was therefore not filed within proper time, and the motion to strike the same was allowed and said bill of exceptions was stricken. Zbinden v. DeMoulin, 243 App. 509-512; Zbinden v. DeMoulin, 328 Ill. 156-159; People v. Rosenwald, 266 Ill. 548-556; Illinois Improvement & Ballast Co. v. Heinsen, 271 Ill. 23-25.

The errors assigned on the record are all directed to matters which must be shown by a bill of exceptions; in other words, the errors assigned do not go to the common law record. That being true, the judgment of the trial court must be affirmed. Zbinden v. DeMoulin, supra, 513; People v. Lucor, 317 Ill. 423; People v. Rosenwald, supra, 556.

Judgment affirmed.

filing a bill of exceptions, either at the term at which the judgment was entered or at a subsequent term. Ricker v. C. & E. R.R. Co., 273 Ill. 625-627; Foley v. Hoyem, 185 App. 612-613. However, the order extending such time, if made at a succeeding term, must be entered prior to the expiration of the time originally fixed. Smith v. Smith, 229 Ill. 429-430; Richter v. C. & E. R. R. Co., supra; Foley v. Hoyem, supra. In this case, the time was not extended during the term term. It does not purport to have been extended at the May term until after the time originally fixed for the filing of said bill of exceptions had expired. Said bill of exceptions was therefore not filed within proper time, and the motion to strike the same was allowed and said bill of exceptions was stricken. Zbinden v. Demoulin, 248 App. 309-312; Zbinden v. Demoulin, 238 Ill. 136-139; People v. Rosenwald, 266 Ill. 646-648; Illinois Improvement & Ballast Co. v. Heinsen, 271 Ill. 24-25.

The errors assigned on the record are all directed to matters which must be shown by a bill of exceptions; in other words, the errors assigned do not go to the common law record. That being true, the judgment of the trial court must be affirmed. Zbinden v. Demoulin, supra, 312; People v. Moor, 317 Ill. 429; People v. Rosenwald, supra, 266.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal ot said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 5 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 8152 Agenda No. 43

ADOLPH KOCH, Appellee -vs- ILLINOIS POWER AND LIGHT COMPANY (A Croporation) Appellant	)	Appeal from Circuit Court of Knox County

Boggs, P. J.

An action on the case was instituted in the circuit court of Knox County by appellee against appellant and one R. H. Stoner to recover for injuries to appellee and his automobile, alleged to have been caused by the negligent operation of appellant's automobile, by the defendant Stoner.

The declaration consists of three counts, each of which in effect charges that R. H. Stoner, the driver of appellant's car, as he approached said intersection, was driving said car in a southerly direction on the wrong side of said street and at a high and dangerous rate of speed, and that he negligently failed to slacken said speed so as to permit appellee, to cross said intersection in safety. Each of said counts aver due care on the part of appellee just prior to and at the time of said collision for his own safety and the safety of his automobile. To said declaration as finally amended appellant and said Stoner filed pleas of not guilty. During said trial, said cause was dismissed as to Stoner. A verdict was returned, finding appellant guilty and assessing appellee's damages at $500. A motion for a new trial was made whereupon appellee entered a remittitur of $48, reducing the amount of said verdict to $452. The motion for a new trial was overruled, and judgment was rendered on said verdict against appellant for said amount. To reverse said judgment, this appeal is prosecuted.

The principal grounds relied on for a reversal are: First, that the verdict is against the manifest weight of the evidence; second, that the court erred in giving appellee's

General Number 8152 Agenda No. 45

ADOLPH KOCH,
Appellee

-vs-

ILLINOIS POWER AND LIGHT COMPANY (A Corporation)
Appellant

Appeal from Circuit Court of Knox County

Boggs, P. J.

An action on the case was instituted in the circuit court of Knox County by appellee against appellant and one R. H. Stoner to recover for injuries to appellee and his automobile, alleged to have been caused by the negligent operation of appellant's automobile, by the defendant Stoner.

The declaration consists of three counts, each of which in effect charges that R. H. Stoner, the driver of appellant's car, as he approached said intersection, was driving said car in a southerly direction on the wrong side of said street and at a high and dangerous rate of speed, and that he negligently failed to slacken said speed so as to permit appellee, to cross said intersection in safety. Each of said counts aver due care on the part of appellee just prior to and at the time of said collision for his own safety and the safety of his automobile. To said declaration as finally amended appellant and said Stoner filed pleas of not guilty. During said trial, said cause was dismissed as to Stoner. A verdict was returned, finding appellant guilty and assessing appellee's damages at $500. A motion for a new trial was made whereupon appellee entered a remittitur of $48, reducing the amount of said verdict to $452. The motion for a new trial was overruled, and judgment was rendered on said verdict against appellant for said amount. To reverse said judgment, this appeal is prosecuted.

The principal grounds relied on for a reversal are: First, that the verdict is against the manifest weight of the evidence; second, that the court erred in giving appellee's

second instruction.

South Prairie and east South streets in the City of Galesburg intersect at right angles, Prairie street running north and south, and South street running east and west. Both of said streets are paved for some distance on either side of the intersection, and there is a street car track about the center of Prairie street.

About 1:15 in the afternoon of March 1, 1926, appellee was driving west on South street toward its intersection with Prairie street, while R. H. Stoner, an employee of appellant, was driving south on Prairie street toward said intersection. In the automobile with appellee was a Mrs. Steuard. No one was riding with Stoner.

Appellee testified: "I was driving fifteen miles an hour from Kellogg street (First street running north and south east of Prairie Street) to about the point of twenty feet of the intersection, I started to slow down and come down to about five to eight miles per hour from a point twenty feet east of the intersection into the intersection . * * * When he (Stoner) got within ten feet of the intersection I saw that he was going fast, about thirty miles per hour he was about 175 feet from the intersection.* * * I didn't see the Stoner car at all when I was twenty feet east of that intersectinn. * * * When I was twelve feet east of that intersection and saw Stoner the first time, he was probably 200 feet north of the intersection, that is my best judgment."

Mrs. Steuard testified: "Mr. Koch was driving about fifteen miles an hour as he left Kellogg street going toward Prairie. Koch slowed down for the intersection as he approached Prairie street. Was about twenty feet from the intersection when he began to slow down. When he began to slow down I could see up Prairie street just a short ways. * * * Mr. Koch was not going very fast when he entered the intersection, about five to eight miles an hour. I saw Stoner's car when he came to within twelve

second instruction.

South Prairie and east South streets in the City of Gleasburg intersect at right angles, Prairie street running north and south, and South street running east and west. Both of said streets are paved for some distance on either side of the intersection, and there is a street car track about the center of Prairie street.

About 1:15 in the afternoon of March 1, 1926, appellee was driving west on South street toward its intersection with Prairie street, while R. T. Stoner, an employee of appellant, was driving south on Prairie street toward said intersection. In the automobile with appellee was a Mrs. Steward. No one was riding with Stoner.

Appellee testified: "I was driving fifteen miles an hour from Kellogg street (first street running north and south east of Prairie Street) to about the point of twenty feet of the intersection. I started to slow down and come down to about five to eight miles per hour from a point twenty feet east of the intersection into the intersection . * * * when he (Stoner) got within ten feet of the intersection I saw that he was going fast, about thirty miles per hour he was about 175 feet from the intersection.* * * I didn't see the Stoner car at all when I was twenty feet east of that intersection. * * * When I was twelve feet east of that intersection and saw Stoner the first time, he was probably 200 feet north of the intersection, that is my best judgment."

Mrs. Steward testified: "Mr. Koch was driving about fifteen miles an hour as he left Kellogg street going toward Prairie. Koch slowed down for the intersection as he approached Prairie street. Was about twenty feet from the intersection when he began to slow down. When he began to slow down I could see up Prairie street just a short ways. * * * Mr. Koch was not going very fast when he entered the intersection, about five to eight miles an hour. I saw Stoner's car when he came to within twelve

feet of the intersection. His car was probably half a block distant, north of Prairie street and headed south. As Koch drove across the intersection Mr. Stoner's car kept on coming probably thirty miles an hour at least. He did not slow down when Koch was crossing the street car tracks. * * * Koch attempted to go the same direction that the Stoner car was driving. He was not allowed to do that. Stoner struck us just then right even with the seat that I was sitting in, on the right side."

E. Duden, signalman for the Burlington Railroad, testified that as he was proceeding south on Prairie street, approaching said intersection, he heard the crash and saw the cars in movement, after he heard the crash. Among other things he testified: "I did not observe Koch's car. It was hit on the north side, about the center. * * * The Stoner car took a glance after it hit, swung around, made a deep swing of about thirty feet over the terrace, over the sidewalk into the yard about ten feet, and back out on the street again on South Street where I seen it standing. When it hit the other car it glanced off and made a deep swing around, then over the curbing, over the terrace, over the sidewalk, and I presume eight, nine, ten feet, whatever it was. * * * The Stoner car was about thirty feet west of the intersection when it stopped."

On the part of appellant, R. H. Stoner, the driver of appellant's car, testified that as he drove down Prairie street, approaching South street, he was driving fifteen to eighteen miles an hour; that as he approached said intersection he looked both east and west; that as he looked east he saw appellee's car approaching. * * * "I was about twenty-five or thirty feet away from the north line of the intersection and the Velie coupe was thirty-five or forty feet from the east line of the intersection. At this time when the Velie coupe was thirty or forty feet east of this intersection it was being driven at twenty-five miles an hour. The speed of the Velie coupe did not at any time slacken, to my knowledge, until the collision took place. The collision took place just west of the street car rails, just west of the center of the street, and with reference to the center of South street it was about the center of

feet of the intersection. His car was probably half a block distant, north of Prairie street and headed south. As Koch drove across the intersection Mr. Stoner's car kept on coming probably thirty miles an hour at least. He did not slow down when Koch was crossing the street car tracks. * * * Koch attempted to go the same direction that the Stoner car was driving. He was not allowed to do that. Stoner struck us just then right even with the seat that I was sitting in, on the right side."

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On the part of appellant, R. E. Stoner, the driver of appellant's car, testified that as he drove down Prairie street, approaching South street, he was driving fifteen to eighteen miles an hour; that as he approached said intersection he looked both east and west; that as he looked east he saw appellee's car approaching. * * * "I was about twenty-five or thirty feet away from the north line of the intersection and the Velie coupe was thirty-five or forty feet from the east line of the intersection. At the time when the Velie coupe was thirty or forty feet east of this intersection it was being driven at twenty-five miles an hour. The [illegible] of the Velie coupe did not at any time slacken, to my [illegible] knowledge, until the collision took place. The collision took place just east of the street car rails, just west of the center of the street, and with reference to the center of South street it was about the center of

the street. * * * I seen him coming and threw my car to the right, and we struck in that position. Sort of V-shape. I turned my car to the right when I saw the crash was inevitable, and tried so to get out of his way."

On cross examination, this witness testified: "When I saw this Velie I was thirty feet north of the intersection. I didn't slow down any, but just took the ordinary course. The first thing I did when I saw this car, I undertook to turn to the right. * * * I could see the car (Velie) thirty or forty feet east of the corner. I judge he was going twenty-five miles an hour. * * * I claim he hit me on the right front fender and wheel. At the time the cars actually came together, my car was about two or two and a half feet west of the west rail. I didn't know anything about the cars came together. I lost control of the car."

Nels Dimmitt testified on behalf of appellant that he worked for the Terry Lumber Company, that his office was ~~stit~~ situated at the southeast corner of the intersection of South and Prairie streets; that "immediately prior to the time of this collision I was at the north window looking out on to the streets there. I saw an automobile approaching the intersection from the north coming down Prairie Street. It was the one driven by Mr. Stoner. I saw an automobile approaching the intersection from the east on South street. It was the one driven by Mr. Koch. The speed of the Stoner automobile as it came south to said intersection was from twenty to twenty-five miles an hour. And the speed of the Koch automobile as it went west toward that intersection was going twenty to twenty-five miles per hour. They were both approaching the intersection at about the same rate of speed. When I saw the Stoner automobile operating at twenty to twenty-five miles an hour it was fifty to seventy-five feet north of the north line of the intersection, and when I saw the Koch car operating at twenty to twenty-five miles an hour I would say it was fifty to seventy-five feet east of the east line of the intersection. Both automobiles were about the same distance from the intersection."

the street. * * * I seen him coming and threw my car to the right, and we struck in that position. Sort of V-shape. I turned my car to the right when I saw the crash was inevitable, and tried so to get out of his way."

On cross examination, this witness testified: "When I saw this Velie I was thirty feet north of the intersection. I didn't slow down any, but just took the ordinary course. The first thing I did when I saw this car, I undertook to turn to the right. * * * I could see the car (Velie) thirty or forty feet east of the corner. I judge he was going twenty-five miles an hour. * * * I claim he hit me on the right front fender and wheel. At the time the cars actually came together, my car was about two or two and a half feet west of the west rail. I didn't know anything about the cars came together. I lost control of the car."

Nels Dimmitt testified on behalf of appellant that he worked for the Terry Lumber Company, that his office was situated at the southeast corner of the intersection of South and Prairie streets; that "immediately prior to the time of this collision I was at the north window looking out on to the streets there. I saw an automobile approaching the intersection from the north coming down Prairie Street. It was the one driven by Mr. Stoner. I saw an automobile approaching the intersection from the east on South street. It was the one driven by Mr. Koon. The speed of the Stoner automobile as it came south to said intersection was from twenty to twenty-five miles an hour. As the speed of the Koon automobile as it went west toward that intersection was going twenty to twenty-five miles per hour. They were both approaching the intersection at about the same rate of speed. Then I saw the Stoner automobile operating at twenty to twenty-five miles an hour it was fifty to seventy-five feet north of the north line of the intersection, and when I saw the Koon car operating at twenty to twenty-five miles an hour I would say it was fifty to seventy-five feet east of the east line of the intersection. Both automobiles were about the same distance from the intersection."

This witness further testified that he did not see either of the automobiles after they entered the intersection; that he heard the crash but did not go out to where the collision took place.

This in substance is the testimony on behalf of both of said parties.

The testimony being sharply conflicting, it was a question of fact for the jury as to whether appellee was in the exercise of due care and as to whether the driver of appellant's car was guilty of negligence as charged. The verdict of the jury is not against the manifest weight of the evidence. We would, therefore, not be warranted in reversing the judgment on account of the evidence. Bradley v. Palmer, 103 Ill. 15-88; VanMeter v. Lambert, 104 App. 243-249.

The instruction complained of is as follows:

"In determining the weight to be given the testimony of a witness, you will take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he or she testifies, his or her interest, if any, in the event of the suit, his or her bias or prejudice, if any, his or her manner on the witness stand, his or her apparent fairness or want of fairness, the reasonableness of his or her testimony, his or her means of observation and knowledge, the character of his or her testimony, whether negative or affirmative, on any fact, and all matters and facts and circumstances shown by the evidence upon the question of the weight to be given his or her testimony, and given to each witness' testimony such weight as to you may seem fairly entitled to."

It is urged against this instruction that the court erred in stating to the jury "you will take into consideration," etc., instead of saying, "you may take into consideration," etc. While we are of the opinion that it would have been more appropriate to have used the word "may" yet the use of the word "will" does not constitute reversible error. Meyer v. Mead, 83 Ill. 19-20; C. B. & Q. R. R. Co. v. Pollock, 195 Ill. 156-162; Chicago Union

This witness further testified that he did not see either of the automobiles after they entered the intersection; that he heard the crash but did not go out to where the collision took place.

This is substance is the testimony on behalf of both of said parties.

The testimony being simply conflicting, it was a question of fact for the jury as to whether appellee was in the exercise of due care and as to whether the driver of appellant's car was guilty of negligence as charged. The verdict of the jury is not against the manifest weight of the evidence. We would, therefore, not be warranted in reversing the judgment on account of the evidence. Bradley v. Palmer, 108 Ill. 16-20; Wickstrom v. Lambert, 104 App. 242-249.

The instruction complained of is as follows:

"In determining the weight to be given the testimony of a witness, you will take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he or she testifies, his or her interest, if any, in the event of the suit, his or her bias or prejudice, if any, his or her manner on the witness stand, his or her apparent fairness or want of fairness, the reasonableness of his or her testimony, his or her means of observation and knowledge, the character of his or her testimony, whether negative or affirmative, on any fact, and all matters and things in the court room shown by the evidence upon the trial, or as may seem worth to be given his or her testimony, and giving to each witness such weight as to you may seem fairly entitled to."

It is urged another instruction that the court erred in stating to the jury "you will take into consideration," etc., instead of saying, "you may take into consideration," etc. While we are of the opinion that it might be better practice to have used the word "may" at the end of the instruction, we do not consider the error reversible error. Wright v. Hall, 18 Ill. App. 18-20; C. B. & Q. R. R. Co. v. Dickson, 138 Ill. 148-152; Chicago Union

Traction Co. v. Yarus, 221 Ill. 641-643; Deering v. Barzak, 227 Ill. 71-78; Elgin, J. & E. Ry. Co. v. Lawlor, 229 Ill. 621-630; Illinois Steel Co. v. Ryska, 102 App. 347-355.

It is also insisted that this instruction directed the jury to take into consideration "the circumstances surrounding the witnesses at the time concerning which he or she testified," etc., without limiting such circumstances to those disclosed by the evidence. While the instruction is not as carefully guarded in this connection as it should be, taking the instruction as a whole, it is not seriously objectionable. Deering v. Barzak, supra, 78.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Traction Co. v. Karns, 221 Ill. 641-642; Deering v. Barnes, 207 Ill. 71-78; Mugin, L. & E. Ry. Co. v. Lawler, 222 Ill. 621-630; Illinois Steel Co. v. Ayers, 102 App. 347-356.

It is also insisted that this instruction directed the jury to take into consideration "the circumstances surrounding the witnesses at the time concerning which he or she testified," etc., without limiting such circumstances to those disclosed by the evidence. While the instruction is not as carefully guarded in this connection as it should be, taking the instruction as a whole, it is not seriously objectionable. Deering v. Barnes, supra, 78.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8040 Agenda 45.

Mary H. Clarey,

Defendant in error,

vs.

Wilbur J. Hudler,

Plaintiff in Error.

Error to the Circuit Court of Winnebago County.

Jett, J.

Mary H. Clarey, defendant in error, hereinafter referred to as plaintiff, instituted suit in the circuit court of Winnebago County, against Wilbur J. Hudler, plaintiff in error, hereinafter referred to as defendant, for food, drink, washing, lodging, chattels and other necessaries, such as clothing, furnished to Frances Hudler, the then lawful wife of the defendant Wilbur J. Hudler,

A jury trial was had with a finding in favor of the plaintiff for $594.00; judgment was rendered on the verdict and the defendant sued out this writ of error.

It appears from the evidence that Wilbur J. Hudler, the defendant, and Frances Rummelhagen were married in November, 1922, at St. Joseph, in the State of Michigan. At the time of their marriage the defendant was of the age of 17 years, and Frances Rummelhagen was of the age of 16 years. After their marriage they resided for a short time in Detroit, and then went to Rockford, Illinois, the home of the plaintiff. Upon their going to Rockford, these young people lived with the plaintiff for about five months, and then went to California and resided with the mother and sister of the defendant.

On or about the 12th day of May, 1924, the plaintiff wrote to her daughter Mrs. Hudler, requesting that she and her husband return to Rockford, and in the letter enclosed two round-trip tickets and $20.00 for expenses; the tickets and expense money having been contributed by the grandfather of the wife of the defendant. The defendant refused to return to Rockford from California; the wife of the defendant returned to Rockford, to the home of her mother the latter part of May, 1924, bringing with her

Mary H. Clarey,

Defendant in error,

vs.

Wilbur J. Hudler,

Plaintiff in Error.

Error to the Circuit Court of Winnebago County.

Left, J.

Mary H. Clarey, defendant in error, hereinafter referred to as plaintiff, instituted suit in the circuit court of Winnebago County, against Wilbur J. Hudler, plaintiff in error, hereinafter referred to as defendant, for food, drink, washing, lodging, chattels and other necessaries, such as clothing, furnished to Frances Hudler, the then lawful wife of the defendant Wilbur J. Hudler.

A jury trial was had with a finding in favor of the plaintiff for $594.00; judgment was rendered on the verdict and the defendant sued out this writ of error.

It appears from the evidence that Wilbur J. Hudler, the defendant, and Frances Rummelhagen were married in November, 1922, at St. Joseph, in the State of Michigan. At the time of their marriage the defendant was of the age of 17 years, and Frances Rummelhagen was of the age of 16 years. After their marriage they resided for a short time in Detroit, and then went to Rockford, Illinois, the home of the plaintiff. Upon their going to Rockford, these young people lived with the plaintiff for about five months, and then went to California and resided with the mother and sister of the defendant.

On or about the 12th day of May, 1924, the plaintiff wrote to her daughter Mrs. Hudler, requesting that she and her husband return to Rockford, and in the letter enclosed two round-trip tickets and $20.00 for expenses; the tickets and expense money having been contributed by the grandfather of the wife of the defendant. The defendant refused to return to Rockford from California; the wife of the defendant returned to Rockford, to the home of her mother the latter part of May, 1924, bringing with her

her a round-trip ticket which was cashed in.

The wife of the defendant resided with her mother until early in November, 1925, at which time she obtained a divorce from her husband. The evidence further shows that on or about June 7, 1924, a short time after his wife returned to Rockford, the defendant wrote her a letter, and among other things said "Keep track of the money your mother gives you, and some day we will pay her and your grandpa back." At the time his wife returned from California to Rockford, the defendant was out of employment and had no funds.

Thereafter the relations between the defendant and his wife became cool and more or less estranged, correspondence was less frequent. In February, 1926, a few months after the divorce had been obtained by his wife, the plaintiff brought this suit. The first notice the defendant had that the plaintiff intended suing him, or making any demands upon him for compensation, came through the attorneys for the plaintiff.

The plaintiff's declaration was based upon the common counts, with an affidavit of claim, stating that the claim was for food, washing, lodging, chattels, and other necessaries furnished by the plaintiff to her daughter, Frances Hudler.

It is insisted by the defendant that the court erred in refusing to admit in evidence, a letter written by the plaintiff to her daughter and son-in-law, prior to her daughter's return from California. The letter in question suggested to the defendant that as he was out of work, he might come back to Illinois, and get something to do here; that she thought it was the best thing to do because Frances and her husband's people were not getting along.

She said for the defendant and his wife to tell the defendant's people, with whom they were living, that she promised to treat Wilbur as good as she could; she would watch him and keep him in good company, and hoped they both accepted the fare home and come home just as soon as they could.

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The wife of the defendant resided with her mother until early in November, 1925, at which time she obtained a divorce from her husband. The evidence further shows that on or about June 7, 1924, a short time after his wife returned to Rockford, the defendant wrote her a letter, and among other things said "Keep track of the money your mother gives you, and some day we will pay her and your grandpa back." At the time his wife returned from California to Rockford, the defendant was out of employment and had no funds.

Thereafter the relations between the defendant and his wife became cool and more or less estranged, correspondence was less frequent. In February, 1926, a few months after the divorce had been obtained by his wife, the plaintiff brought this suit. The first notice the defendant had that the plaintiff intended suing him, or making any demands upon him for compensation, came through the attorneys for the plaintiff.

The plaintiff's declaration was based upon the common counts, with an affidavit of claim, stating that the claim was for food, washing, laundry, chattels, and other necessaries furnished by the plaintiff to her daughter, Frances Hadler.

It is insisted by the defendant that the court erred in refusing to admit in evidence, a letter written by the plaintiff to her daughter and son-in-law, prior to her daughter's return from California. The letter in question suggested to the defendant that as he was out of work, he might come back to Illinois, and get something to do here; that she thought it was the best thing to do because Frances and her husband's people were not getting along.

She said for the defendant and his wife to tell the defendant's people, with whom they were living, that she promised to treat, without as good as she could; she would watch him and see his is good company, and hoped they both accepted the fare home and come home just as soon as they could.

The letter in question is an invitation to the defendant and his wife, by the plaintiff, to come and live with her. She stated that she had bought a new bed for them, and that she lived in a good neighborhood. The letter suggests defendant and his wife tell Mrs. Osler, the mother of Hudler, she thinks it the best thing to do. It is apparent from this letter, plaintiff felt it was best to get her daughter away from California because of the friction between her daughter and mother-in-law.

In view of the state of the record, we are of the opinion that this letter should have been admitted, as bearing upon the circumstances under which the daughter of the plaintiff returned to Rockford.

The defendant offered in evidence a letter written by the plaintiff to Miss Clarinda Hudler, dated May 10, 1924. The plaintiff identified the latter and admitted it was in her hand writing. In the letter, among other things, she said "If you people can come back to Rockford and find one person that I have ever run Wilbur down to, I would like you to do it. I always praised him to the highest; I have always tried to treat him right; I have invited him to make his home with me; I have offered to do all I can for them; I have even offered to pay one of their fares back to Rockford; as he was laid off and didn't have work; I have offered to buy Frances clothes, as she is naked". Further on in the letter she also said, "Your people don't want her in your family, I am willing to take her back. Tell Wilbur as long as he don't love her and don't want her, tell him her mother does, and tell him to go on through life, to be a good boy." It is evident from this letter that the plaintiff invited the defendant and his wife to make their home with her. She had offered to pay, in part, the expense of returning to Rockford. The tone of the whole letter is that of a woman who was endeavoring to relieve the unfortunate situation in which these two young people found themselves.

No expressed contract is shown to exist between the plaintiff and defendant, and whether or not there was an implied contract depends upon the facts, circumstances, and relationship

The letter in question is an invitation to the defendant and his wife, by the plaintiff, to come and live with her. She stated that she had bought a new bed for them, and that she lived in a good neighborhood. The letter suggests defendant and his wife tell Mrs. Vojor, the mother of Mudler, she thinks it the best thing to do. It is apparent from this letter, plaintiff felt it was best to get her daughter away from California because of the friction between her daughter and mother-in-law.

In view of the state of the record, we are of the opinion that this letter should have been admitted, as bearing upon the circumstances under which the daughter of the plaintiff returned to Rockford.

The defendant offered in evidence a letter written by the plaintiff to Miss Clarinda Mudler, dated May 10, 1924. The plaintiff identified the letter and admitted it was in her hand writing. In the letter, among other things, she said "If you people can come back to Rockford and find one person that I have ever run Wilbur down to, I would like you to do it. I always praised him to the highest; I have always tried to treat him right; I have invited him to make his home with me; I have offered to do all I can for them; I have even offered to pay one of their fares back to Rockford; as he was laid off and didn't have work; I have offered to buy furnace clothes, as she is ragged". Further on in the letter she also said, "Your people don't want her in your family, I am willing to take her test. Well Wilbur as long as he don't love her and don't want her, tell him her not of course, and tell him to go on through life, to be a good boy." It is quite evident from this letter that the plaintiff invited the defendant and his wife to make their home with her. She had offered to pay, in part, the expense of returning to Rockford. The tone of the whole letter is that of a woman who was anxious to relieve the unfortunate situation in which these two young people found themselves.

No extended comment is deemed to exist between the plaintiff and defendant, and whether or not there was a higher contract depends upon the facts, circumstances, and relationship

of the parties. It appears to us that both of these letters should have been admitted. It is urged by the plaintiff that the statement of the defendant in his letter to his wife, telling her "Keep track of the money your mother gives you, and some day we will pay her and your grandpa back," warrants a recovery against the defendant for food, washing, lodging, etc.

It is contended by the defendant that it was not his intention to pay board for his wife, and that the mother did not expect pay therefor. The statement of the defendant, made in his letter to his wife, should not be extended beyond its ordinary and usual meaning, even though defendant may be liable for actual money loaned to his wife, or paid out for her at her request, for clothing. It certainly should not include board, or other incidental expenses in connection with her living with the family of her mother.

In passing it is proper to say that at the time of the decree of divorce, the defendant, who had come into the possession of some property after his wife had returned to her mother, paid to his wife, about $2000.00 in settlement of their property rights.

Owing to the failure to admit the letters in question, in evidence, and for the reason that the verdict is excessive, the cause will be reversed and remanded, which is accordingly done.

Reversed and Remanded.

of the parties. It appears to me that both of these letters should have been admitted. It is urged by the plaintiff that the statement of the defendant in his letter to his wife, telling her "Keep track of the money your mother gives you, and some day I will pay her and your grandpa back," determine a recovery against the defendant for food, washing, lodging, etc.

It is contended by the defendant that it was not his intention to pay board for his wife, and that the mother did not expect pay therefor. The statement of the defendant, made in his letter to his wife, should not be extended beyond its ordinary and usual meaning, even though defendant may be liable for actual money loaned to his wife, or paid out for her on her request, for clothing. It certainly should not include board, or other incidental expenses in connection with her living with the family of her mother.

In passing it is proper to say that at the time of the issuance of injunc, the defendant, who had come into the possession of some property after his wife had returned to her mother, paid to his wife, about $2000.00 in settlement of their property rights.

Owing to the failure to admit the letters in question, in evidence, and for the reason that the verdict is excessive, the cause will be reversed and remanded, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 3 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.	:	
-vs-	:	ERROR TO THE CIRCUIT COURT OF MCHENRY COUNTY
JOSEPH GRIVETTI, Plaintiff in Error.	:	

Jett, J.

Joseph Grivettit, Plaintiff in Error, was indicted by the grand jury of the County of McHenry, for a supposed charge of mayhem. A jury trial was had resulting in a finding against the plaintiff in error. Motions for a new trial and in arrest of judgment were made, denied, and judgment was rendered upon the verdict of the jury. Plaintiff in error was fined One Thousand Dollars, and sentenced to the Illinois State Farm at Vandalia, for a period of one year, and to stand committed to said State Farm, until the find and costs were paid.

A number of reasons are assigned for a reversal of the judgment. Owing to the view we take of the case, it will only be necessary to consider one assignment, that is that the court erred in failing to quash the second county of the indictment.

The indictment, as originally returned, contained two counts, the first of which was quashed by the trial court. The case was tried on the second count which reads as follows:-

"And the Grand Jurors, chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one Joseph Grivetti, late of the County of McHenry and State aforesaid, on the to-wit, 24th day of February in the year of our Lord, one thousand nine hundred and twenty-eight, in a certain room in a house located on a farm owned by one Melvin Lillibridge, in the County and State aforesaid, in which

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error.	
-vs-	ERROR TO THE CIRCUIT COURT OF MCHENRY COUNTY
JOSEPH GRIVETTI, Plaintiff in Error.	

Left, 1.

Joseph Grivetti, Plaintiff in Error, was indicted by the grand jury of the County of McHenry, for a supposed charge of mayhem. A jury trial was had resulting in a finding against the plaintiff in error. Motions for a new trial and in arrest of judgment were made, denied, and judgment was rendered upon the verdict of the jury. Plaintiff in error was fined One Thousand Dollars, and sentenced to the Illinois State Farm at Vandalia, for a period of one year, and to stand committed to said State Farm, until the fine and costs were paid.

A number of reasons are assigned for a reversal of the judgment. Owing to the view we take of the case, it will only be necessary to consider one assignment, that is that the court erred in failing to quash the second count of the indictment.

The indictment, as originally returned, contained two counts, the first of which was quashed by the trial court. The case was tried on the second count which reads as follows:-

"And the Grand Jurors, chosen, selected and sworn, in and for the County of McHenry, in the name and by the authority of the People of the State of Illinois, upon their oaths aforesaid, do further present that one Joseph Grivetti, late of the County of McHenry and State aforesaid, on the to-wit, fifth day of February in the year of our Lord, one thousand nine hundred and twenty-eight, in a certain room in a house located on a farm owned by one Melvin Hillbridge, in the County and State aforesaid, in which

there were divers persons present, and the said Joseph Grivetti, with malicious intent, one, William Liamacher, then and there to maim and disfigure, in and upon the said William Liamacher feloniously did make an assault, and with malicious intent, did then and there bite, with his teeth, the nose of the said William Liamacher, in manner as aforesaid, the said William Liamacher, to maim and disfigure, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois."

The statute on which the indictment was based provides:- "Whoever, with malicious intent, to maim or disfigure, cuts or maims, the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits, or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one, nor more then twenty years, or fined not exceeding $1,000 and confined in the county jail, not exceeding one year."

It is the contention of the plaintiff in error that the indictment does not charge the offense of mayhem. In that view we concur. The most that can be said of the second count is that the plaintiff in error had a malicious intent to maim and disfigure the complaining witness, and with malicious intent to bite his nose. The indictment fails to charge that the plaintiff in error cut, slit or mutilated the nose of the prosecuting witness. That is the gist of the offense as provided by the statute.

The defendant in error relies upon People vs. Yuskauskas, 268 Ill. 328, to sustain the second count of the indictment. The indictment returned against the plaintiff in error does not contain the allegations or averments, as found in the case relied upon by the defendant in error. Upon reading the indictment as reported in the Yuskauskas case, it is readily seen that it charges an offense under the section of the Statute in question.

It is charged in that case that the defendant, "with

there were divers persons present, and the said Joseph Trivetti, with malicious intent, one, William Hanscher, then and there to maim and disfigure, in and upon the said William Hanscher feloniously did make an assault, and with malicious intent, did then and there bite, with his teeth, the nose of the said William Hanscher, in manner as aforesaid, the said William Hanscher, to maim and disfigure, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois."

The statute on which the indictment was based provides:-

"Whoever, with malicious intent, to maim or disfigure, cuts or maims, the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits, or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one, nor more than twenty years, or fined not exceeding $2,000 and confined in the county jail, not exceeding one year."

It is the contention of the plaintiff in error that the indictment does not charge the offense of mayhem. In that view we concur. The most that can be said of the second count is that the plaintiff in error had a malicious intent to maim and disfigure the complaining witness, and with malicious intent to bite his nose. The indictment fails to charge that the plaintiff in error cut, slit or mutilated the nose of the prosecuting witness. That is the test of the offense as provided by the statute.

The defendant in error relies upon People vs. Yuakuakea, 268 Ill. 538, to sustain the second count of the indictment. The indictment returned against the plaintiff in error does not contain the allegations or averments, as found in the case relied upon by the defendant in error. Upon reading the indictment as reported in the Yuakuakea case, it is readily seen that it charges an offense under the section of the statute in question. It is charged in that case that the defendant, "with

force and arms did then and there unlawfully, maliciously, and feloniously make an assault in and upon one Katarina Yuskauskas,*** with the unlawful, malicious and felonious intent to then and there maim and disfigure the said Katarina Yuskauskas, *** with the teeth of him, the said Willem Yuskauskas, did then and there unlawfully and feloniously mutilate the nose of said Katarina Yuskauskas, *** with the unlawful, felonious and malicious intent to then and there and thereby, and in the manner aforesaid unlawfully, maliciously and feloniously maim and disfigure the said Katarina Yuskauskas,"

We therefore conclude that the second count of the indictment, on which plaintiff in error was tried, failed to charge the offense of mayhem, and the judgment of the circuit court of McHenry County is reversed.

Judgment reversed.

force and arms did then and there unlawfully, maliciously, and feloniously make an assault in and upon one Katarina Vaskanakes,*** with the unlawful, malicious and felonious intent to then and there murder and dispatch the said Katarina Vaskanakes, *** with the teeth of him, the said Milion Vaskanakes, did then and there unlawfully and feloniously bite the nose of said Katarina Vaskanakes, *** with the unlawful, felonious and malicious intent to then and there, and thereby, and in the manner aforesaid unlawfully, maliciously and feloniously maim and disfigure the said Katarina Vaskanakes."

We therefore conclude that the second count of the indictment, on which plaintiff in error was tried, failed to charge the offense of mayhem, and the judgment of the criminal court of Mahoning County is reversed.

Judgment reversed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 20 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 8079 Agenda No. 4.

In the Appellate Court
of Illinois
Second District
October Term, A.D. 1929.

Harry B. Brown, Administrator of
the Estate of Catherine Brown,
deceased,
appellee,
vs
The Chicago, Rock Island &
Pacific Railway Company, a
corporation,
appellant.

Appeal from the Circuit Court
of La Salle County.

Opinion by Boggs, P. J.

An action on the case was instituted by appellee against appellant in the circuit court of La Salle County to recover for the death of appellee's intestate, alleged to have been caused by negligence on the part of appellant. The declaration consists of three original counts and one additional count.

The first count charges that Aurora street in the city of Marseilles intersects appellant's tracks at right angles; "that the defendant caused a warning bell to be placed near said crossing, to be rung when trains were approaching, and provided a crossing flagman, who should * * * warn persons of approaching trains; that it was the duty of defendant to give due warning of the approach of trains toward said crossing by ringing the bell or blowing a whistle for at least eighty rods from such crossing and continue the same until said crossing was reached, and to cause its signal bell to be rung and to provide that the flagman give due notice to persons approaching said crossing; that it was the duty of the

Gen. No. 8079 Agenda No. 4.

In the Appellate Court
of Illinois
Second District
October Term, A.D. 1929.

Harry B. Brown, Administrator of
the Estate of Catherine Brown,
deceased,

appellee,

vs.

The Chicago, Rock Island &
Pacific Railway Company, a
corporation,

appellant.

Appeal from the Circuit Court
of La Salle County.

Opinion by Boggs, P. J.

An action on the case was instituted by appellee against appellant in the circuit court of La Salle County to recover for the death of appellee's intestate, alleged to have been caused by negligence on the part of appellant. The declaration consists of three original counts and one additional count.

The first count charges that Amore street in the city of Marseilles intersects appellant's tracks at right angles; "that the defendant caused a warning bell to be placed near said crossing, to be rung when trains were approaching, and provided a crossing flagman, who should " " " warn persons of approaching trains; that it was the duty of defendant to give due warning of the approach of trains toward said crossing by ringing the bell or blowing a whistle for at least eighty rods from such crossing and continue the same until said crossing was reached, and to cause the signal bell to be rung and to provide that the flagman give the notice to persons approaching said crossing; that it was the duty of the

defendant to cause its trains to be run at a reasonable rate of speed and its passenger trains not to exceed ten miles per hour; yet, the defendant neglected all of said duties and carelessly and negligently in the nighttime of the day aforesaid, at the hour of seven o'clock P. M., operated one of its passenger trains westerly along its said tracks over and upon said Aurora street at a high and dangerous rate of speed, * * * without * * * blowing a whistle or ringing a bell, for a distance of eighty rods from said crossing, and failed to have its flagman attending said crossing," etc.

The second count is based on a charge of general negligence. The third count charges a want of "due notice and warning of the approach of said train, and on account of the absence of the flagman," etc. The additional count charges wilful and wanton conduct on the part of appellant in the operation of its said train, etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of $4,000. To reverse said judgment, this appeal is prosecuted.

Appellant's railroad consists of two main tracks, running in an easterly and westerly direction through said city of Marseilles, which tracks are practically straight for several miles on either side of said city. The northerly track at the Aurora street crossing is the west bound track, and the southerly is the east bound. Aurora street runs north and south, and intersects said tracks at right angles, some 400 feet east of appellant's depot. Main street, the first street west of Aurora street, is some 400 to 450 feet west of said depot. Washington street in said city runs east and west parallel to and about 55 feet north of appellant's railroad tracks. On the east side of Aurora street is a plank sidewalk, five feet wide, for pedestrians. There is a crossing bell located south of the east-bound track and west of Aurora street, which is

defendant to cause his train to be run at a reasonable rate of speed and the passenger train not to exceed ten miles per hour; yet, the defendant neglected all of said duties and wrongfully and negligently in the nightime of the day aforesaid, at the hour of seven o'clock P. M., operated one of the passenger trains negligently along the said track over and upon said Avenue thereof at a high and dangerous rate of speed, " " without " " having a whistle or ringing a bell, nor a lookout or sufficient warning, crossing, and failed to have the flagman attending said crossing, etc.

The second count is based on a charge of wanton negligence. The third count charges a want of due notice and warning of the approach of said train, and on account of the absence of the flagman, etc. The additional count charges willful and wanton conduct on the part of appellant in the operation of the said train, etc.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee in the sum of $4,000. To reverse said judgment this appeal is prosecuted.

Appellee's evidence consists of two main tracks, running in an easterly and westerly direction across the city of Connellsville, which tracks are practically straight for several miles on either side of said city. The northerly track of the Pennsylvania Railroad is the main bound track, and the southerly is the main inbound. Juvenile school train north and south, and intersecting said tracks at right angles, runs the 100 feet east of Pittsburgh Avenue. Well-worn the first street west of Pittsburgh Avenue is Fan Street, and on said street, approximately [illegible] feet north of said tracks, [illegible] street parallel to and about [illegible] feet north of the main tracks. On the east side of Pittsburgh Avenue, [illegible] feet wide, for pedestrians. [illegible] north of the main-bound track [illegible] Avenue, [illegible]

operated by a battery. A flagman's shanty stands six feet east of the sidewalk and eight feet north of the north rail of the west-bound track. At the time in question the flagman, whose name was Ross, lost his life in attempting to rescue appellee's intestate. As one approaches the tracks on Aurora street from the north, there are no obstructions to the view either to the west or to the east, except said flagman's shanty.

The decedent, Catherine Brown, seventeen years of age, with her sister Marcella, aged twelve years, lived north and east of Aurora street. On the evening in question, the decedent and her sister started from their home to the Cozy Theatre, located on Main street, south of said tracks. They walked west on Washington street to the East side of Aurora street, thence south to said tracks, where appellee's intestate was struck and killed by an engine on the west-bound track.

It is first contended by appellant that the court erred in refusing to exclude the evidence and direct a verdict in its favor at the close of appellee's evidence. It is insisted that said evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not fairly tend to prove the averments of appellee's declaration.

We are not prepared to say that, on a motion to direct a verdict, appellee's evidence does not fairly tend to prove the averments of the negligence counts.

A separate motion was made with reference to the willful and wanton count. In support of this count appellee insists that the speed of the train was excessive; that there was a failure to blow a whistle or sound a bell; that the crossing bell was not ringing; that the flagman was not in the performance of his duties; and that the train was being operated with a dim headlight; that, from these facts and circumstances, the jury would be warranted in finding that appellant was guilty of willful and wanton conduct.

operated by a battery. A flagman's shanty, nearly six feet east of the sidewalk and eight feet north of the north rail of the west-bound track. At the time in question the flagman, whose name was Ross, left his life in attempting to rescue appellee's intestate. As one approaches the tracks on Jackson street from the north, there are no obstructions to the view either to the west or to the east, except said flagman's shanty.

The decedent, Catherine Green, seventeen years of age, with her sister Marcella, aged twelve years, lived north and east of Jackson street. On the evening in question, the decedent and her sister started from their home to the Long Theatre, located on Main street, south of said tracks. They walked east on Washington street to the east side of Jackson street, thence south to said tracks, where appellee's intestate was struck and killed by an engine on the west-bound track.

It is first contended by appellant that the court erred in refusing to exclude the evidence and direct a verdict in its favor at the close of appellee's evidence. It is insisted that said evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not fairly tend to prove the allegations of appellee's declaration.

We are not prepared to say that, on a motion to direct a verdict, appellee's evidence does not fairly tend to prove the allegations of the declaration.

A separate motion was made with reference to the [illegible] and wanton count. In support of this count appellee insists that the speed of the train was excessive; that there was failure to blow a whistle or ring a bell; that the locomotive had defective headlights; that the flagman was not in the performance of his duties; and that the train was being operated [illegible] from home tracts on Jackson street, [illegible] indicating that appellant was guilty of willful and wanton misconduct.

Morgan Young, in behalf of appellee, testified that on the night in question he was employed at an oil filling station about 150 feet north of said tracks and some 200 feet west of Aurora street; that he was waiting on a customer and did not notice either train come in; that, from the distance the west-bound engine was standing west of Aurora street, he judged that it had been running 25 to 30 miles per hour at said crossing. On motion, the testimony of this witness with reference to the speed of said train was stricken. He further testified that he did not recall whether or not he heard the whistle; that he was busy around the station and did not pay any attention to the train until he saw it stopped short of the station.

Agnes O'Neil testified that she lived about a block east of Aurora street, and something like 500 to 600 feet north of appellant's tracks; that on the night in question she was in her kitchen, washing dishes, and "did not hear any train whistle for any crossing within half an hour before " the accident.

James Wier testified that he lived 100 feet north of appellant's tracks; that on the night in question he was at home and "I was sitting in the living room, on the south side of the house, six or eight feet from the sidewalk. I did not hear any train whistle"; that he went down to the crossing, and the west bound train was standing on the track, with the last car of the train on the crossing and the engine about at the depot.

James Mitchell testified that on the night in question he was near the depot, waiting for the train; that he heard both trains come in but did not know how fast they were running; "I was looking at the headlight of the east bound train. When the train back of me blowed I did not look back because I looked at the station to see if I would be in the clear. When the light brightened up I looked back and I saw a lantern go out like that --I saw a kid run like that, and I saw the lantern go out like that." This

Morgan Young, in behalf of appellee, testified that on the night in question he was engaged at an oil filling station about 150 feet north of said track and some 800 feet east of Lumore street; that he was waiting on a customer and did not notice either train come in; that, from the distance the westbound engine was standing west of Lumore street, he judged that it had been running 25 to 30 miles per hour at said crossing. On motion, the testimony of this witness with reference to the speed of said train was stricken. He further testified that he did not recall whether or not he heard the whistle; that he was busy around the station and did not pay any attention to the train until he saw it stopped short of the station.

Agnes O'Neil testified that she lived about a block east of Lumore street, and somewhere like 500 to 600 feet north of appellant's tracks; that on the night in question she was in her kitchen washing dishes, and "did not hear any train whatever for any crossing within half an hour before" the accident.

Jason Moor testified that he lived 150 feet north of appellant's tracks; that on the night in question he was at home and "I was sitting in the living room, on the south side of the house, six or eight feet from the sidewalk. I did not hear any train whistle"; that he went down to the crossing, and the westbound train was standing on the tracks, with the light on of the train on the crossing and the engine about at the depot.

James Wiswell testified that on the night in question he was near the depot, waiting for the mail; that he heard the train come in and did not hear any bell ring or whistle. I was looking at the building at the east bound train. When the train came to a stop I did not look back because I looked at the station to see if I could see the train. When the light came up I looked back and I saw a burning as if the train was -- the train like that, and I saw the lights on the like that. The

witness testified that at the time of the trial he was employed by appellant as a crossing watchman. On cross examination he testified that he heard the west-bound train whistle, more than once; that the west-bound train stopped with its engine a little bit east of the station.

Marcella Brown testified that she and the decedent on the night in question, left their home about 7:10, to go to the Cozy Theatre, on Main street, south of appellant's tracks; that they went south from their home to Washington street, then west on Washington to Aurora, and south on the sidewalk on the east side of Aurora; that in crossing Washington street; Catherine got a couple of steps ahead of her. "After I got on to the east side of Aurora street I looked east to see if any train was coming, and there was none coming. There was a train coming from the west. We walked on until we got to a few feet from the crossing and then a train came from the east. I did not see any flagman there before I saw the train. My sister was about two steps ahead of me. I looked, and I saw the train coming--it was almost there, and somebody with a green lantern ran out of the shanty. He went behind me and I turned and ran back. I did not see any flagman before that time. I did not hear the train whistling or any bell rung. I did not hear any bell ringing at the crossing. * * * I did not see my sister after I saw this train. She was hit by the train. I did not see the train hit her."

This witness further testified that the crossing bell at the Aurora street crossing did not ring that night; there is an electric light at Aurora and Washington streets; that it was not burning, and that it was a dark night.

This was substantially the evidence offered by appellee. This evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not tend to prove willful and wanton conduct. Illinois C. R. R. Co. v. Lenier, 202 Ill. 624; Heidinreich v. Bremer, 260 Ill. 439; Brown v. Illinois Terminal Co. 215 App. 454; Bernier v. Illinois Central R. R. Co., 215 App. 454; Richardson v. Franklin

witness testified that at the time of the trial he was employed by appellant as a crossing watchman. On cross examination he testified that he heard the west-bound train whistle, more than once; that the west-bound train stopped with its engine a little bit east of the station.

Marcella Brown testified that she and the decedent on the night in question, left their home about 7:10, to go to the Gray Theatre, on Main street, south of appellant's tracks; that they went south from their home as to Washington street, then west to Washington to Aurora, and south on the sidewalk on the east side of Aurora; that in crossing Washington street; detendne got a couple of steps ahead of her. "After I got on to the east side of Aurora street I looked east to see if any train was coming, and there was none coming. There was a train coming from the west. We walked on until we got to a few feet from the crossing and then a train came from the east. I did not see any flagman there before I saw the train. My sister was about two steps ahead of me. I looked, and I saw the train coming--it was almost there, and somebody with a green lantern ran out of the shanty. He were behind us and I turned and ran back. I did not see any flagman before that time. I did not hear the train whistling or any bell rung. I did not hear any bell ringing at the crossing. " " " I did not see my sister after I saw this train. She was hit by the train. I did not see the train hit her."

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This was substantially the evidence offered by appellant. This evidence, taken as true, with all reasonable inferences to be drawn therefrom, does not tend to prove willful and wanton conduct. Illinois C. R. R. Co. v. Lonier, 207 Ill. 339; Washington v. Traver, 220 Ill. 420; Brown v. Illinois Central R. R. Co. 218 Ill. 427; Terminal v. Illinois Central R. R. Co., 221 Ill. 164; Illinois C. R. R. Co. v. Hamlin

235 App. 440-447. In Brown v. Illinois Terminal Co., supra, the court ag page 331 says:

"A willful or wanton injury must have been intended, or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through negligence or carelessness when it could have been discovered by the exercise of ordinary care."

The court therefore erred in failing to direct a verdict on the willful and wanton count.

It is further insisted that the verdict is against the manifest weight of the evidence. Inasmuch as the case will have to be retried, we refrain from discussing the question of the weight of the evidence.

It is also insisted that the court erred in giving the first and second instructions given on behalf of appellee.

As to appellee's first given instruction, it is insisted that its effect is to assume the exercise of ordinary care on the part of appellee's intestate for her own safety, instead of submitting that issue to the jury. Inasmuch as the effect of this instruction is to direct a verdict, we are of the opinion that the objection is well taken.

Appellee's second instruction is as follows:

"The court instructs the jury as a matter of law, that by wanton and wilful misconduct, as used in these instructions, is not meant malice, ill will or hatred, but it meant that kind of conduct which tends to show a gross want of care and regard for the rights of others".

In the view we hold of this record, the giving of any instruction on willful and wanton conduct was not proper, as the court should have directed a verdict on the willful and wanton count.

238 App. 440-447. In Brown v. Illinois Terminal Co., supra, the court on page 281 says:

"A willful or wanton injury must have been intended, or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through negligence or carelessness when it could have been discovered by the exercise of ordinary care."

The court therefore erred in failing to direct a verdict on the willful and wanton count.

It is further insisted that the verdict is against the manifest weight of the evidence. Inasmuch as the case will have to be retried, we refrain from discussing the question of the weight of the evidence.

It is also insisted that the court erred in giving the first and second instructions given on behalf of appellee.

As to appellee's first given instruction, it is insisted that its effect is to assume the exercise of ordinary care on the part of appellee's intestate, for her own safety, instead of submitting that issue to the jury. Inasmuch as the effect of this instruction is to direct a verdict, we see no reason why the objection is well taken.

Appellee's second instruction is as follows:

"The court instructs the jury as a matter of law, that if wanton and willful misconduct, as used in these instructions, is not found malice, ill will or hatred, but it means that kind of conduct which tends to show a gross want of care and regard for the rights of others".

In the view we hold of this record, the giving of our instruction on willful and wanton conduct was not proper, as the court should have directed a verdict on the willful and wanton count.

However, it may be said that the court erred in giving this instruction, as it does not correctly state the law with reference to what constitutes willful and wanton conduct. Illinois C.R. Co. v. Leiner, supra, 631; Heidenreich v. Bremer, supra, 446; Bernier v. Illinois C. R.R. Co., supra, 457; Killalay v. Hawk, 250 App. 222-229.

Lastly, it is insisted that the court erred in refusing to give appellant's refused instructions 26 and 28. Instruction 26 is as follows:

"If the jury believe from ~~them~~ the evidence that under all the facts and circumstances surrounding said Catherine Brown shown by the evidence when she was walking on the sidewalk, approaching the crossing of said sidewalk and said railroad, ordinary care and caution required that she should look and listen to ascertain whether any locomotive engine and train of cars was approaching said crossing from the east within such distance as to make it dangerous or unsafe to walk upon the said ~~xxxxxxx~~ crossing, then it was the duty of said Catherine Brown to look and listen before walking upon said railroad at said crossing; and if the jury believe from the evidence that said Catherine Brown neglected or failed to do so, and that if she had so looked and listened she would have discovered the approach of said locomotive and train of cars in sufficient time to have avoided the injury, then the plaintiff cannot recover under the first, second and third counts of the declaration."

This instruction states a correct principle of law, and the court erred in refusing to give the same. Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267-275-276; Fowler v. Chicago & E.I.R.R. Co., 234 Ill. 619-624; Weber v. Chicago B. & Q. R.R. Co., 142 App. 550-558; Ohlwein v. Osborne, 176 App. 324-328; Greenwall v. Baltimore & O. R.R. Co. 332 Ill. 627-632.

There was no error in refusing to give appellant's instruction 28.

Cross errors were assigned, in one of which it is contended

However, it may be said that the court erred in giving this instruction, as it does not correctly state the law with reference to what constitutes willful and wanton conduct. Illinois C.R. Co. v. Leiner, supra, 631; Reichenstein v. Brewer, supra, dec; Dowler v. Illinois C. R.R. Co., supra, 487; Kilkelay v. Hawk, 270 App. 282-283.

Lastly, it is insisted that the court erred in refusing to give appellant's refused instructions 20 and 22. Instruction 20 is as follows:

"If the jury believe from the evidence that under all the facts and circumstances surrounding said Catherine [illegible] at the evidence when she was walking on the sidewalk, approaching the crossing of said sidewalk and said railroad, ordinary care and caution required that she should look and listen to ascertain whether any locomotive engine and train of cars was approaching said crossing from the east within such distance as to make it dangerous or unsafe to walk upon the said crossing crossing, then if was the duty of said Catherine Brown to look and listen before walking upon said railroad at said crossing; and if the jury believe from the evidence that said Catherine Brown looked or failed to do so, and that if she had so looked and listened she would have discovered the approach of said locomotive and train of cars in sufficient time to have avoided the injury, then the plaintiff cannot recover under the first, second and third counts of the declaration."

This instruction states a correct principle of law, and the court erred in refusing to give the same. Illinois Cent. R.R. Co. v. O'Donnell, 208 Ill. 287-273-270; Crafton v. Illinois C.R.R. Co., 208 Ill. 214-224; Weber v. Chicago [illegible] 390-388; Ohlwein v. Jackson, 170 App. 344-347; [illegible] more C.O. R.R. Co. 152 Ill. 221-228.

There was no error in refusing to give appellant's instruction 22.

These errors were material, in one of which it is [illegible]

that the court erred in giving appellant's instruction 16, which is as follows:

"The court instructs the jury that the additional count to the original declaration charges that the defendant willfully and wantonly killed the deceased."

This instruction would tend to mislead the jury, and the court should not have given the same.

It is also insisted that the court erred in striking out certain testimony offered on the part of appellee. We have examined the record in this connection and are of the opinion that the court did not err in said ruling.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

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For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 8142 Agenda No. 37

Fred J. Braid, Administrator of The Estate of Glen L. Braid, Deceased, appellee, -vs- Osborne Oil Company, a Corporation, appellant	Appeal from the Circuit Court of Winnebago County

Boggs, P. J.

An action on the case was instituted by appellee as administrator of the estate of Glen L. Braid, deceased, in the circuit court of Winnebago County against appellant, to recover pecuniary damages to the next of kin for the death of said deceased, charged to have been caused by the negligence of appellant.

The first count of the declaration charges general negligence on the part of the driver of a truck owned by appellant. The second count purports to be a willful and wanton count. The third count charges that the driver of a truck owned by appellant was operating the same more than one hour after sunset "without lighted headlights". The fourth count pleads an ordinance of the city of Rockford with reference to carrying lighted lamps, etc., on motor vehicles, and charges a violation thereof.

To said declaration appellant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of appellee for $9,000. To reverse said judgment, this appeal is prosecuted.

lee's Appellant's intestate, who at the time in question was some twenty-one years of age, was the owner of a Graham-Paige sedan. On December 20, 1928, about 7:00 to 7:30 P. M., he, with his mother, Bertha Braid, and a brother, Leslie Braid, then about seventeen years of age, was driving south on North Main Street in the city of Rockford. Appellee's intestate was driving, the moth-

er was sitting in the center, and the brother Leslie on the right.

A switch track crosses Main Street in an easterly and westerly direction at the northern extremity of said city, the south rail of said track being in the city limits and the north rail outside. Connecting with Main Street and running north from said track is a paved State highway, with a black line running down the center thereof. There was also a black line extending south from said track, down the center of Main Street. Main Street is a paved street, some forty to fifty feet in width at the point of the collision. The record discloses, and it is practically conceded by the parties, that, south from said switch track, on Main Street, it is a closely built up district, there being business buildings and residences on both sides of said street. The warehouse or station of appellant, who is engaged in the oil business, is located on the west side of Main street, a short distance south of said switch track.

On the evening in question, the driver of one of appellant's trucks was proceeding north on Main Street. At a point a short distance south of said track, the automobile driven by appellee's intestate collided with said truck, resulting in a fatal injury to appellee's intestate, and in more or less serious injuries to the other occupants of said automobile.

Numerous errors were assigned on the record, many of which were not referred to in the argument. One of the errors assigned is that the court erred in refusing to exclude the evidence and to direct a verdict in favor of appellant, on motions to that effect, made at the close of appellee's evidence and again at the close of all the evidence. In this connection it is stremuously urged that there is no affirmative proof of the exercise of ordinary care on the part of appellee's intestate.

There was some testimony that appellee's intestate was looking south through the windshield, just prior to the time of said collision. The other occupants of the car testified that they were also looking south, and did not see appellant's truck, or any lights. Without going into a detailed discussion of the evidence

we do not feel warranted in holding that the court erred in refusing to direct a verdict.

It is also insisted for a reversal of said judgment that the court erred in permitting testimony to go to the jury, over the objection of appellant, to the effect that appellee's intestate was a regular attendant at Sunday school, church, etc.

The right of recovery in this character of case is limited to the pecuniary loss suffered by the next of kin of the deceased. North Chicago S. R. Co. v. Brodie, 156 Ill. 317-320; Chicago, P. & St. L. R. R. Co. v. Woolridge, 174 Ill. 330-335; Wilcox v. Bierd, 330 Ill. 571-581.

Mental and physical characteristics and capacity to be of service, habits of industry and sobriety, earning capacity, etc., are all elements proper to be considered in assessing the pecuniary loss sustained. City of Chicago v. Schloten, 75 Ill 468-472; Betting v. Hobbett, 142 Ill. 72-77; O'Fallon Coal Co. v. Laquet, 198 Ill. 125-128; Murgario v. Chicago, B. & Q. R. R. Co., 239 App. 544-552. Some of the cases have held, where the suit involved the death of a father, that it was proper to show the moral and religious training which the father was giving to the next of kin, his children. Benson v. Chicago City Ry. Co., 208 App. 613-615; O'Fallon Coal Co. v. Laquet, supra, 128. That rule, however, would not go to the extent of making proper proof of a person's characteristics with reference to his attending church and Sunday school. The court erred in admitting said testimony.

It is also insisted that the court erred in refusing to give appellant's first refused instruction, which is as follows:

"The Court instructs the Jury that the statutes of the State of Illinois, provide as follows: 'Upon approaching any highway crossing and railroad at grade, the person controlling the movement of any self-propelled vehicle shall reduce the speed of such vehicle to a rate of speed not to exceed ten (10) miles per hour.'

"The Court further instructs you that this is a valid and subsisting law of the State of Illinois, and that, if you be-

we do not feel warranted in holding that the court erred in refusing to direct a verdict.

It is also insisted as a reversal of said judgment that the court erred in permitting evidence to go to the jury, over the objection of appellant, to the effect that appellant's intestate was a regular attendant at Sunday school, church, etc.

The right of recovery in this character of case is limited to the pecuniary loss suffered by the next of kin of the deceased. North Chicago S. R. Co. v. Brodie, 156 Ill. 317-320; Chicago, B. & Q. R. R. Co. v. [illegible], 174 Ill. [illegible]; Wilcox v. Bierd, 330 Ill. 571-581.

Moral and physical characteristics and capacity, habits of service, habits of industry and sobriety, earning capacity, etc., are all elements proper to be considered in ascertaining the pecuniary loss sustained. City of Chicago v. Scholten, 75 Ill. 468-471; Hartley v. [illegible], [illegible] Ill. [illegible]; [illegible] Coal Co. v. Lagroe, 1[illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. App. [illegible]. None of the cases cited hold, where the suit involved the death of a father, that it was proper to show the moral and religious training which the father was giving to his children, [illegible] of him, his children. [illegible] v. [illegible], [illegible] Ill. App. [illegible]; Phillips Coal Co. v. [illegible], [illegible]. That rule, however, would not go to the extent of making proof of a good moral characterization of [illegible] in attendance at Sunday school. The court erred in admitting such evidence.

It is also insisted that the court erred in refusing to give appellant's tendered instruction, which is as follows:

"The court instructs the jury that the statutes of the State of Illinois provide as follows: 'Any person driving [illegible] highway, operating and traveling [illegible] of any self-propelled vehicle [illegible] motor vehicle at a rate of speed not [illegible] than [illegible] miles an hour.'"

The court further instructs [illegible] that [illegible] it is [illegible] for [illegible] of [illegible], and [illegible]

lieve from the evidence in this case that deceased, Glen Braid, just before and at the time of the collision was driving his automobile at a rate of speed in excess of ten miles per hour and in violation of this law, and that said driving at a rate of speed in excess of ten miles per hour and in violation of this law was the proximate cause or in any degree contributed to bring about his injury and death, then the Court instructs you to find the defendant, Osborne Oil Company, not guilty."

This instruction is not carefully worded, but, in the main, it states a correct principle of law. However, the applicability of this instruction depends somewhat on the evidence with reference to where the collision in fact occurred with reference to said track. Inasmuch as the testimony of appellant tends to show that the collision took place at a point only about twenty-five feet south of said track, and as appellee's witnesses testified that said automobile, at the time it crossed said tracks, was traveling twenty-five miles per hour, we hold that an instruction of that character was proper to be given.

One of the principal grounds relied on for a reversal of said judgment is that counsel for appellee, in the argument to the jury, used ~~xx~~ language, the necessary effect of which was to inflame the minds of the jury. Among other things, counsel for appellee stated:

"That mother sitting there between those two sons, according to the testimony here, it was twelve below zero, undoubtedly a cold night. They were coming from the country. One thing she knew she had. She had a boy that she had nursed from her breast. She had a boy that had grown up under her tutelage to manhood. She had a boy--and it was strange that my friend, Mr. Knight, all the time was objecting because I wanted to show the character of that boy, which is one of the principal elements in this case. * * * *

"She had a boy that she could absolutely trust. She could put her hand on his shoulder and say at any time, 'My son, I trust you. You have gone to school; you have gone to a school as far as people in ordinary circumstances can afford to send you, you

[illegible]

[illegible]

[illegible]

have attended the Sunday schools and the churches, ' and gentlemen of the jury, that is a mighty good place for our boys and girls to be. If they were all there instead of being in pool halls and on golf courses we would not have so much crime among our young folks. * * * You have no right to consider any evidence that there was a railroad track or that they drove up to this railroad track at twenty miles an hour, or on the track at forty miles an hour, or at any other rate. That is not an issue in this case and you have no right to consider it and it isn't proper to be argued. * * *

"Most of us are married and have families, you all know what your children are to you, and you know what the love and affection of your wife, the mother of your children, is. You know that if you had a hundred children and somebody was to kill one of them you could not select the one you would want to be killed. You all know that, and it isn't necessary for me to elaborate on and discuss a matter that is so plain, so self-evident, so self-asserted in the minds of every man. * * * Gentlemen of the jury, I want to bring this home to you. I want you to think of this, -- here is this mother sitting in that car between her two sons, riding along in perfect security. * * *

"So that the fact that this young man had the fear of God and the love of the Supreme Being in his heart doesn't detract anything from this situation that I am going to picture to you; doesn't take from that boy's character nor from his standing up to the time of his awful and sudden death. But that mother sat there beside that boy, who, when he entered the home in the evening after his day's work and received a kiss from her dear lips she knew that he had not been out robbing or destroying human life."

At this point counsel for appellant objected. The court overruled the objection, saying: "I think he has a right to comment on the evidence." Thereupon counsel proceeded:

"His cheerful voice, the expression of his countenance, of a powerful physique, the vigor of young manhood brought a cheer into that home when he came in there, and it remained there

have alluded [illegible] [illegible] [illegible] and the mountain, I say gentlemen of the jury, that is a county road clear for one mile and a half to [illegible]. If they were all [illegible] [illegible] of [illegible] in [illegible] [illegible] not [illegible], we would not [illegible] [illegible] [illegible]. * * * but have no right to consider any evidence that takes [illegible] a [illegible] [illegible] [illegible] [illegible] twenty miles an hour, or on the basis of thirty miles an hour, or at any other rate. That is not an issue in this case and you have no right to consider it and it isn't proper to be argued. * * *

"Think of us men married and with families, you all know what your children are to you, and you know what the love and affection of your wife, the mother of your children, is. You know that if you had a hundred children and somebody was to kill one of them you would not select the one you would want to be killed. You all know that, and it isn't necessary for me to discourse to you or discuss a matter that is so plain, so self-evident, so self-asserted in the minds of every one. * * * Gentlemen of the jury, I want to bring this home to you. I want you to sense in this, -- here is this [illegible] sitting in that car between [illegible] the same, riding along in perfect equality. * * *

"To [illegible] the [illegible] this [illegible] and the love of God and the love of the [illegible] [illegible] in [illegible] [illegible] anything from [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the time of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]."

At this point counsel for appellant [illegible]. The court overruled the objection, saying: "[illegible] depends on the evidence." [illegible]

"His [illegible] [illegible] [illegible] of the [illegible] was, of a [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] a [illegible] [illegible] [illegible] [illegible] [illegible]

until he left."

"This kind of argument cannot be justified, and, if willfully persisted in, will justify the reversal of a judgment, even though the court has sustained objections to it. It is of itself sufficient reason for granting a new trial." Bale v. Chicago J. Ry. Co., 259 Ill. 476-482; Appel v. Chicago City Ry. Co., 259 Ill. 561-567; Bishop v. Chicago J. Ry. Co., 289 Ill. 63-71.

Where the record shows that an attorney has deliberately and repeatedly indulged in prejudicial argument to the jury, the effect of such misconduct cannot be measured, and the only remedy is to grant a new trial. Eshelman v. Bawalt, 298 Ill. 192-195; Bishop v. Chicago J. Ry. Co., supra, 71; Illinois P. & L. Corp., 311 Ill. 123; Mattis v. Klewans, 312 Ill. 299-310.

It is error for counsel to attempt in an argument to have the jury put themselves in the position of one of the parties. Thomas v. Illinois P. & L. Corp., 247 App. 378-388.

It is not necessary that a verdict be excessive in order to reverse a judgment on account of inflammatory and prejudicial argument of counsel. City of Centralia v. Ayres, 133 App. 290-294; Westbrook v. Chicago & N. W. R. R. Co., 248 App. 444-451.

Where counsel has objected to a line of argument, as was done in this case, he is not bound to renew his objection to each remark in that line, in order to assign error thereon. Chicago U. T. Co. v. Lauth, 216 Ill. 176-180. In this case, the court not only failed to sustain an objection to the prejudicial remarks, but overruled the same.

The whole purpose of the law to obtain a trial by a fair and impartial jury is defeated if appeals to their passion and prejudice are to be permitted during the course of the trial. Bale v. Chicago J. Ry. Co., supra; McCoy v. Chicago & A. R. R. Co., 268 Ill. 244-248; Chicago & A. R. R. Co. v. Scott, 232 Ill. 419-423; Paulsen v. McAvoy Brewing Co., 220 App. 273-290.

As appellee's right of recovery in this case was limited to the pecuniary damages to the next of kin, the remarks of counsel as above set forth are of such inflammatory character that,

will so lead."

"This kind of argument cannot be justified, and, if willfully persisted in, will justify the reversal of a judgment, even though the court has sustained objections to it. It is a [illegible] sufficient reason for granting a new trial." [illegible] v. [illegible], 308 Ill. 196-202; [illegible] v. [illegible], 262 Ill. 556-563; [illegible] v. [illegible], [illegible] Ill. [illegible]

Where the [illegible] is [illegible] to prejudice the defend- ant's rights [illegible] in [illegible] statements to the jury, the effect of such misconduct cannot be corrected, and the only remedy is to grant a new trial. [illegible] v. [illegible], 306 Ill. [illegible]; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible]

It is never the proper [illegible] of counsel to [illegible] the jury [illegible] of one of the parties. [illegible] v. [illegible], [illegible].

It is not necessary that a verdict be excessive in order to [illegible] a [illegible] of improper and prejudicial argument of counsel. [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]

Where counsel [illegible] to [illegible] improper [illegible] and [illegible] it is not enough [illegible] the objection to such [illegible] in this case, [illegible]. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] only [illegible] to [illegible] of the [illegible] was [illegible] the [illegible].

The [illegible] of [illegible] a jury to [illegible] as a [illegible] and [illegible] may [illegible] not [illegible] the [illegible] of the [illegible]. [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible].

In [illegible] a [illegible] of [illegible] to the [illegible] of the [illegible] of [illegible] as [illegible] of [illegible] of [illegible] [illegible]

in and of themselves, they would be sufficient to warrant a reversal of this case.

Error was assigned on the giving of appellee's instructions. However, this assignment of error was not referred to in the argument.

It is also insisted that the court, on the motion for a new trial, should have considered certain testimony taken at the coroner's inquest. Inasmuch as the cause is being reversed and there will be a new trial, it is not necessary for us to discuss this assignment of error.

We will not discuss the weight of the evidence, either on the issue of the due care of appellee's intestate or of negligence on the part of the driver of appellant's truck, other than to say it is conflicting, and that it was of such character that, in order to sustain a verdict, the record must be substantially free from error.

The judgment of the trial court will therefore be reversed for the ruling of the court on appellant's first refused instruction, the rulings on the evidence, and the argument of counsel for appellee as above set forth.

Reversed and remanded.

[illegible]

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

LENA GILL, APPELLEE.	:	
VS.	:	APPEAL FROM THE CIRCUIT COURT OF KNOX COUNTY.
NORTH AMERICAN UNION, A CORPORATION. APPELLANT.	:	

Jett, J.

Lena Gill, appellee, brought suit against North American Union, a corporation, appellant, in the Circuit Court of Knox County, to recover on a certificate in a fraternal benefit society in the sum of $1,000.00.

Appellee, in her declaration, avers that Robert G. Gill, the insured, for whom the plaintiff was beneficiary, was a member of the North American Union, and the holder of a beneficiary certificate, issued by the North American Union. The certificate among other things provides, that upon the death of the insured while a member of the North American Union, and providing he had not violated any of the laws of the North American Union, the North American Union would pay his beneficiary the sum of $1,000. The certificate also provides:- "In consideration of the application of Robert G. Gill herein called the insured, for membership, the statements, agreements and warranties, and each of them made and subscribed to in the said application in the medical examination blank, and the answers made to the medical examiner, each and all of which are hereby declared to be warranties, and of the further agreement to abide by and be bound by the constitution, laws, rules and regulations of the North American Union as now in force, or as they or any of them may, from time to time be modified or changed, or such as may hereafter be enacted or adopted, all of which are hereby made a part of this contract, the said North American Union agrees and promises to pay to Lena Gill, wife of the insured, the sum of $1,000 less any indebtedness, lien, interest or other charges due the Society. Said payments will be made at the home office in the City of

LENA GILL, APPELLEE.	
vs.	APPEAL FROM THE CIRCUIT COURT OF MONROE COUNTY.
NORTH AMERICAN UNION, A CORPORATION, APPELLANT.	

Lett, J.

Lena Gill, appellee, brought suit against North American Union, a corporation, appellant, in the Circuit Court of Monroe County, to recover on a certificate in a fraternal benefit society in the sum of $1,000.00.

Appellee, in her declaration, avers that Robert G. Gill, the insured, for whom the plaintiff was beneficiary, was a member of the North American Union, and the holder of a beneficiary certificate, issued by the North American Union. The certificate among other things provides, that upon the death of the insured while a member of the North American Union, and providing he had not violated any of the laws of the North American Union, the North American Union would pay his beneficiary the sum of $1,000. The certificate also provides:- "In consideration ##### of the application of Robert G. Gill herein called the insured, for membership, the statements, agreements and warranties, and each of them made and subscribed to in the said application in the medical examination blank, and the answers made to the medical examiner, each and all of which are hereby declared to be warranties, and of the further agreement to abide by and be bound by the constitution, laws, rules and regulations of the North American Union as now in force, or as they or any of them may, from time to time be modified or changed, or such as may hereafter be enacted or adopted, all of which are hereby made a part of this contract, the said North American Union agrees and promises to pay to Lena Gill, wife of the insured, the sum of $1,000 less any indebtedness, lien, interest or other charges due the society. Said payments will be made at the home office in the City of

Chicago, State of Illinois, upon receipt of and approval of satisfactory evidence of the fact and of the cause of the death of the insured: provided, however, that the membership of the said insured and this certificate, which has been issued in evidence of such membership, are at the time of death of insured in full force and effect in accordance with the constitution, laws, rules and regulations of the said North American Union, and provided this certificate has not been previously surrendered, forfeited or cancelled."

The beneficiary certificate contains certain conditions of payment among which was the following provision; "The insured hereby agrees for himself or herself, or for any person or persons that may have or claim any interest in this certificate, that in case his or her death shall occur by his or her own hand, or act, while either sane or insane, or in consequence of any civil disorder, the limit of recovery hereunder shall be the amount of his or her contribution to the mortuary fund of the Society, not exceeding one half the face amount of the certificate, less any pre-payments or indebtedness (including liens and interest thereon,) chargeable or charged to this certificate and due the Society."

It is further averred in the declaration that the said Robert G. Gill complied with all the conditions of the certificate and that he died on the 30th day of August, 1928, and that the beneficiary furnished proofs of death to the defendant, the North American Union; that the North American Union offered to pay to the plaintiff and to deliver to the plaintiff, its check for $347.45 in full payment of all its liability, and that the plaintiff returned the check to the North American Union, and refused to accept the same.

To the declaration the appellant pleaded the general issue and a special plea setting up that the North American Union was a fraternal beneficiary society, organized and existing under and by virtue of the laws of the state of Illinois; that it was organized not for profit but for the sole benefit of its members and their beneficiaries; that it had a ritualistic form of work

Chicago, State of Illinois, upon receipt of and approval of satisfactory evidence of the fact and of the cause of the death of the insured: provided, however, that the membership of the said insured and this certificate, which has been issued in evidence of such membership, are at the time of death of insured in full force and effect in accordance with the constitution, laws, rules and regulations of the said North American Union, and provided this certificate has not been previously surrendered, forfeited or cancelled."

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It is further averred in the declaration that the said Robert G. Gill complied with all the conditions of the certificate and that he died on the 20th day of August, 1928, and that the beneficiary furnished proofs of death to the defendant, the North American Union; that the North American Union offered to pay to the plaintiff and to deliver to the plaintiff, its check for $347.45 in full payment of all its liability, and that the plaintiff returned the check to the North American Union, and refused to accept the same.

To the declaration the appellant pleaded the general issue and a special plea setting up that the North American Union was a fraternal beneficiary society, organized and existing under and by virtue of the laws of the state of Illinois; that it was organized not for profit but for the sole benefit of its members and their beneficiaries; that it had a ritualistic form of work

and representative form of government; that it has a constitution and by-laws, and that the constitution and by-laws entered into and formed a part of the contract between the members and beneficiary and the North American Union; that the by-laws of the North American Union in part provided, "If a member shall die by his own hand, or act, either sane or insane, such death shall forfeit any and all rights and claims to the amount agreed to be paid on his death, and specified in the benefit certificate of such member and the beneficiary shall receive and be paid in lieu thereof, a sum equal to the total amount actually paid by such member to the mortuary and reserve funds of the Order, unless it is otherwise provided in and by the benefit certificate of such member, issued prior to the taking effect of this section."

he special plea of the defendant further avered that the insured, the said Robert G. Gill, for whom the plaintiff is beneficiary, came to his death by suicide, and that the death of the said Robert G. Gill was caused by his voluntary act, and that he died by his own hand committed with the intention of taking his life and that by reason of the fact that the insured committed suicide and took his own life, the only sum that the plaintiff was entitled to recover was the amount paid by the insured into the Mortuary Fund, which was the sum of $347.45 which said sum the defendant offered to pay and is still willing to pay the appellee.

On the trial of the case before a jury a finding was had in favor of appellee in the sum of $1,000, and the appellant prosecuted this appeal. Appellant insists that the court erred in refusing to admit certain evidence bearing upon the question as to how the insured came to his death.
It appears that the coroner's verdict, coroner's report of evidence and the certificate of vital statistics and affidavit of appellee, were made part of the proofs of death by appellee, the beneficiary herein and were by her caused to be sent to the North American Union as her proofs of death. The trial court was of the opinion that the proofs of death were not admissible in evidence, and refused to admit any part thereof.

and representative form of government; that it has a constitution and by-laws, and that the constitution and by-laws entered into and formed a part of the contract between the members and beneficiary and the North American Union; that the by-laws of the North American Union in part provided, "If a member shall die by his own hand, or act, either sane or insane, such death shall forfeit any and all rights and claims to the amount agreed to be paid on his death, and specified in the benefit certificate of such member and the beneficiary shall receive and be paid in lieu thereof, a sum equal to the total amount actually paid by such member to the mortuary and reserve funds of the Union, unless it is otherwise provided in and by the benefit certificate of such member, issued prior to the taking effect of this section."

In special plea of the defendant further averred that the insured, the said Robert G. Gill, for whom the plaintiff is beneficiary, came to his death by suicide, and that the death of the said Robert G. Gill was caused by his voluntary act, and that he died by his own hand committed with the intention of taking his life and that by reason of the fact that the insured committed suicide and took his own life, the only sum that the plaintiff was entitled to recover was the amount paid by the insured into the mortuary fund, which was the sum of $[illegible] on which said sum the defendant offered to pay and is still willing to pay the appellee.

On the trial of the case before a jury a finding was had in favor of appellee in the sum of $1,000, and the appellant prosecuted this appeal. Appellant insists that the court erred in refusing to admit certain evidence bearing upon the question as to how the insured came to his death.

It appears that the coroner's warrant, together with the evidence and the certificate of vital statistics [illegible] of appellee, were made part of the proofs of death [illegible] the beneficiary herein and were by her issued to [illegible] North American Union as her proofs of death. [illegible] was of the opinion that the proofs of death were [illegible] in evidence, and refused to admit any part thereof.

It is the contention of the appellant that the parties to an insurance policy or certificate have a right to make any agreement they choose.

The proofs of death furnished by the appellant required the furnishing of these documents and the plaintiff adopted the same and vouched for the truth contained therein.

In Modern Woodmen of Americanvs. Davis, 184 Ill. 236, suit was brought on a benefit certificate and the coroner's verdict, corner's report of evidence, together with other evidence, were offered as a part of the proof of death and in its opinion the court said, "Any statement contained in the notice and proofs of death was available to the order as evidence in the nature of admission made by the plaintiff in the action, * * ** The proof of death were admissible in evidence. Such proofs included the affidavit of John A. Hoffman, M.D. to the effect the immediate cause of death of the assured member was 'acute alcholism.' The court refused to permit the Order to introduce this affidavit as being part of the proofs of death, to the jury, but required the affidavit to be detached and admitted the remainder of the papers constituting the proofs. In so doing we think the court was in error."

Gill vs. Modern Woodmen of America, 221 Ill. App. 388, was a suit in assumpsit in which Abbie B. Gill sued the Modern Woodmen of America upon a benefit certificate for $2,000 issued to one Harry A. Gill, since deaeased. The declaration consisted of the common counts and two special counts. The special counts are in substance the same and aver that the company issued its policy to Harry A. Gill on August 19, 1909, for $2,000; that insured died July 1, 1918; that proof of death and claim for benefit were furnished appellant and that appellees were entitled to recover from appellant the face of the policy.

Appellant, the Modern Woodmen of America, pleaded the general issue and five special pleas. The first special plaa averred that the Modern Woodmen of America delivered to Gill its benefit certificate, which was accepted by him, and which certif-

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Appellant, the Modern Woodmen of America, pleaded the general issue and five special pleas. The first special plea averred that the Modern Woodmen of America delivered to Gill its benefit certificate, which was accepted by him, and which certif-

icate provided that if said insured should become intemperate in the use of drugs or narcotics said certificate would become void, and alleges that the insured did become intemperate in the use of drugs and narcotics. The second and third special pleas aver that the contract sued on provides that if said Gill's death resulted directly or indirectly from his intemperate use of drugs or narcotics the contract would be void.

The second plea charges his death occurred directly from the use of drugs and narcotics, and the third, that his death indirectly resulted therefrom. The fourth avers that Gill became and was intemperate in the use of intoxicating liquors and that under said contract it became void. The fifth special plea avers that Gill made application to appellee for said benefit certificate, which application was made a part of his contract, and that in said application the statements made by Gill were warranted by him to be literally true; that said Gill in said application stated that he did not use any drug or narcotic or stimulant except tobacoo, and that he had never taken any treatment for the morphine, cocain or opium habit. It is however, avered in the plea that these statements were not true. A trial was had with a finding in favor of the beneficiary of the said Harry A. Gill in the sum of $2,000. On the trial the proofs of death were offered, and the Court on page 395, said: "The court did not err in allowing the appellant to offer the proofs of loss so far as they pertained to the statement made by appellee, Abbie B. Gill, or to the statement made by the physician."

Ferrero vs. Knights and Ladies of Security, 309 Ill. 476, was a suit brought by Minnie Ferrero, against the Knights and Ladies of Security based upon a benefit certificate. A trial was had and judgment rendered in favor of the plaintiff, which was affirmed by the Appellate Court, and appeal was prosecuted to the Supreme Court.

The declaration set forth the benefit certificate and averred compliance with its terms, provisions and conditions. The defendant pleaded the general issue, especially setting forth two defenses; one defense was a provision of the law of the society

lists provided that if said insured should become intemperate in the use of drugs or narcotics said certificate would become void, and alleges that the insured did become intemperate in the use of drugs and narcotics. The second and third special pleas aver that the contract sued on provides that if said Gill's death resulted directly or indirectly from his intemperate use of drugs or narcotics the contract would be void.

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Horrero vs. Knights and Ladies of Security, 209 Ill. 476, was a suit brought by [illegible] against the Knights and Ladies of Security based upon a benefit certificate. A trial was had and judgment rendered in favor of the plaintiff, which was affirmed by the Appellate Court, and appeal was prosecuted to the Supreme Court.

The declaration set forth the benefit certificate and averred compliance with the terms, conditions and obligations. The defendant pleaded the general issue, [illegible] with two defenses; one defense was a provision of the law of the society

that in case any one holding a certificate, should attempt to ~~attempt to~~ commit suicide, either sane or insane, the certificate should become null and void, and that the assured on the 3rd day of April, 1921, attempted to commit suicide. The other defense was based on a provision that in case any member should die by his own hand, whether sane or insane, the full liability of the Society should be the amount actually paid by the member into the benefit fund, and it was charged that the assured died as the result of a wound inflicted upon himself with suicidal intent, that the amount paid to the benefit fund was $31.10, which had been tendered to the plaintiff and refused. The plaintiff joined issue on the pleas and a hearing was had which resulted in a verdict for the plaintiff for $952.00, on which judgment was rendered. On the trial of the case the statements in the proofs of death were admitted in evidence, and in its decision at pages 479 and 480 the court said: "The cause of death given in the proofs of death and coroner's verdict was aspiration pneumonia, and in the proofs of death submitted by the plaintiff there was also a statement of the coroner in answer to a question; the question was "Did the deceased commit suicide?" and the answer was "From evidence submitted, wound in the neck made with razor by himself with suicidal intent before being admitted to Anna State Hospital. When Ferrero cut his throat his act might be at the time recognized as an attempt to commit suicide because death was not immediate, but his death was by suicide, the proof that he died by his own hand was conclusive, and there was no evidence tending to prove the contrary."

The defendant had the burden of establishing the fact of suicide, notwithstanding the statement in the proofs of death. (Knights of Maccabees v. Stensland, 206 Ill. 124; Knights of Templars and Masons Life Indemnity Co. v. Crayton, 209 id. 550) The statement in the proofs of death above quoted was admissible in evidence but not conclusive on either party. (Modern Woodmen v. Davis 184 Ill. 236; Kieswetter v. Knights of Maccabees 227 id. 48). The plaintiff did not offer any evidence inconsistent

that in case any one holding a certificate, should attempt to attempt to commit suicide, either sane or insane, the certificate should become null and void, and that the assured on the 3rd day of April, 1921, attempted to commit suicide. The other defense was based on a provision that in case any member should die by his own hand, whether sane or insane, the full liability of the society should be the amount actually paid by the member into the benefit fund, and it was charged that the assured died as the result of a wound inflicted upon himself with suicidal intent, that the amount paid to the benefit fund was $41.10, which had been tendered to the plaintiff and refused. The plaintiff joined issue on the plea and demurring was had which resulted in a verdict for the plaintiff for $95.00, on which judgment was rendered. On the trial of the case the statements in the proofs of death were admitted in evidence, and in its decision at pages 479 and 480 the court said: "The cause of death given in the proofs of death and coroner's verdict was asphyxiation pneumonia, and in the proofs of death furnished by the plaintiff there was also a statement of the coroner in answer to a question; the question was 'Did the deceased commit suicide?' and the answer was 'From evidence submitted, wound in the neck made with razor by himself with suicidal intent before being admitted to Sanatorium Hospital. Then farmed out his throat his sec high so at the time recognized as an attempt to commit suicide because done was not immediate, but his death was [illegible], but proof that he died by his own hand was conclusive, [illegible] tending to prove the [illegible]."

The defendant had the burden of establishing the fact of suicide, notwithstanding the presumption in the proofs of death. (Knights of Maccabees v. [illegible], [illegible]; [illegible] of Templars and Legion Life Insurance Co., [illegible]). The statement in the proofs of death above [illegible] in evidence but not conclusive on [illegible] v. Davis, 164 Ill. 336; Hieneffer v. [illegible] 227 id. 46). The plaintiff did not offer any [illegible]

with the statement made, and there was no conflict in the evidence which established the fact of suicide."

In view of the rule as above announced the court in the instant case, erred in refusing to admit the proofs of the death. The judgment of the circuit court of Knox County is reversed and the cause remanded.

Reversed and Remanded.

with the statement made, and there was no conflict in the evidence which established the fact of suicide."

In view of the rule as above announced the court in the instant case, erred in refusing to admit the proofs of the death. The judgment of the circuit court of Knox County is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty- _____

_____
Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Crawford State Savings Bank
a corporation,
Plaintiff in error,
vs.
Royal Indemnity Company,
a corporation,
Defendant in error,

Error to the Circuit Court
of Kane County.

May Term, 1929.

Jett, J,

This is a suit in assumpsit, instituted by the Crawford State Savings Bank, a corporation, plaintiff in error, hereinafter referred to as plaintiff, against the Royal Indemnity Company, a corporation, defendant in error, hereinafter referred to as defendant, upon a policy of insurance by which the defendant undertook to indemnify the plaintiff against loss through dishonest acts of the employees of the plaintiff.

The declaration alleges that the defendant, on July 22, 1923, issued its $50,000 banker's blanket bond, indemnifying the plaintiff against loss from embezzlement by any of its employees. The bond in question continued in force from July 23, 1923, until July 22, 1925, when it was superseded by another bond; that on May 26, 1926, it was discovered that an employee of the plaintiff during the term of the bond, had embezzled $8600.00; that notice of this loss, with itemized proof of loss had been given to the defendant, but that it refused to pay.

To the declaration the defendant pleaded the general issue; a jury trial was had, with a finding in favor of the defendant and the plaintiff prosecutes this writ of error. It is insisted by plaintiff that the verdict of the jury is against the manifest weight of the evidence.

Crawford State Savings Bank
a corporation,
Plaintiff in error,

vs. Error to the Circuit Court
Royal Indemnity Company, of Lake County.
a corporation,
Defendant in error,

May Term, 1929.

Jett, J.

This is a suit in assumpsit, instituted by the Crawford State Savings Bank, a corporation, plaintiff in error, hereinafter referred to as plaintiff, against the Royal Indemnity Company, a corporation, defendant in error, hereinafter referred to as defendant, upon a policy of insurance by which the defendant undertook to indemnify the plaintiff against loss through dishonest acts of the employees of the plaintiff.

The declaration alleges that the defendant, on July 23, 1921, issued its $50,000 banker's blanket bond, indemnifying the plaintiff against loss from embezzlement by any of its employees. The bond in question continued in force from July 23, 1921, until July 23, 1925, when it was superseded by another bond; that on May 24, 1926, it was discovered that an employee of the plaintiff within the term of the bond, had embezzled $8000.00; that notice of this loss, with itemized proof of loss had been given to the defendant, but that it refused to pay.

To the declaration the defendant pleaded the general issue; a jury trial was had, with a finding in favor of the defendant and the plaintiff prosecutes this writ of error. It is contended by plaintiff that the verdict of the jury is against the manifest weight of the evidence.

The bond of the defendant was in force during the time of the employment of one Arthur R. Giannotti, the defaulting employee. Giannotti was a witness for plaintiff, and in his deposition among other things, testified that he was short $7900.00 on May 16, 1925, and stated in detail how he took the money from time to time.

The record discloses that by an examination conducted by the Illinois State Auditor, Giannotti was a defaulter to the extent of $11,000 or more.

It is quite evidence from the evidence that Giannotti was a defaulter during the term that the bond in question was in effect, and, conceding that there might be some difference of opinion as to the amount of the loss on July 22, 1925, the record discloses the fact that the shortage on said date was $7900.00.

In view of the state of the record it is not necessary to discuss what is further shown by the evidence for the reason that we are of the opinion that the only question involved is the amount of the shortage.

It is insisted by the defendant that since the jury passed upon the question of fact and found for the defendant, the judgment of the lower court should be sustained.

Owing to the facts as shown herein we cannot follow the suggestion of the defendant. The judgment of the Circuit Court of Kane County will be reversed and the cause remanded.

Reversed and Remanded.

The bond of the defendant was in force during the time of the employment of one Arthur C. Giannotti, the defaulting employee. Giannotti was a witness for plaintiff, and in his deposition among other things, testified that he was short $7900.00 on May 1s, 1925, and stated in detail how he took the money from time to time.

The record discloses that by an examination conducted by the Illinois State Auditor, Giannotti was a defaulter to the extent of $11,000 or more.

It is quite evidence from the evidence that Giannotti was a defaulter during the term that the bond in question was in effect, and, conceding that there might be some difference of opinion as to the amount of the loss on July 22, 1925, the record discloses the fact that the shortage on said date was $7900.00.

In view of the state of the record it is not necessary to discuss what is further shown by the evidence for the reason that we are of the opinion that the only question involved is the amount of the shortage.

It is insisted by the defendant that since the jury passed upon the question of fact and found for the defendant, the judgment of the lower court should be sustained.

Owing to the facts as shown herein we cannot follow the suggestion of the defendant. The judgment of the Circuit Court of Kane County will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the First day of October, in the year of our Lord one thousand nine hundred and twenty-nine, within and for the Second District of the State of Illinois:

Present--The Hon. FRANKLIN H. BOGGS, Presiding Justice.

Hon. THOMAS M. JETT, Justice.

Hon. NORMAN L. JONES, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 25 1930 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

8084 Agenda 51.

Board of Trustees John
Stuart Ryburn Memorial
Hospital of Ottawa, La Salle
County, Illinois,

appellees,

vs.

Bree S. Kelly,

appellant,

Appeal from the Circuit Court
of La Salle County.

May Term, 1929.

Jett, J.

Board of Trustees of John Stuart Ryburn Memorial Hospital of Ottawa, La Salle County, Illinois, filed its bill in the Circuit Court of La Salle County, summons returnable to the June Term, 1929, against Bree S. Kelly, appellant, alleging that appellees as trustees of John Stuart Ryburn Memorial Hospital, had discharged Bree S. Kelly, appellant, as a superintendent of said institution for mis-management and insubordination; ~~after~~ that after her discharge the appellant had refused to vacate said hospital premises, and the room or rooms occupied by her as a dwelling place, and to surrender the keys and records thereof.

The prayer of the bill is to the effect that Bree S. Kelly, appellant be perpetually enjoined and restrained from remaining in or entering the said hospital, except as a patient, or from interfering in any manner with any of the managers, employees or patients therein.

Appellant filed an answer to the bill and upon replication being filed thereto, and after hearing thereon, the court, on the 25th day of March, 1929, entered an interlocutory decree, granting the relief prayed for in said bill ofcomplaint, and this appeal was prosecuted by appellant.

Board of Trustees John
Stuart Ryburn Memorial
Hospital of Ottawa, La Salle
County, Illinois,

appellees,

vs.

Appeal from the Circuit Court
of La Salle County.

Bree S. Kelly,

appellant,

May Term, 1929.

Jett, J.

Board of Trustees of John Stuart Ryburn Memorial Hospital of Ottawa, La Salle County, Illinois, filed its bill in the Circuit Court of La Salle County, summons returnable to the June Term, 1929, against Bree S. Kelly, appellant, alleging that appellees as trustees of John Stuart Ryburn Memorial Hospital, had discharged Bree S. Kelly, appellant, as superintendent of said institution for mis-management and inexpedition; ~~xxxx~~ that after her discharge the appellant had refused to vacate said hospital premises, and the room or rooms occupied by her as a dwelling place, and to surrender the keys and records thereof.

The prayer of the bill is to the effect that Bree S. Kelly, appellant be perpetually enjoined and restrained from remaining in or entering the said hospital, except as a patient, or from interfering in any manner with any of the officers, employees or patients therein.

A demurrer filed an answer to the bill and upon a hearing being filed thereto, and after hearing thereon, the court, on the 25th day of March, 1929, entered an interlocutory decree, granting the relief prayed for in said bill of complaint, and this appeal was prosecuted by appellant.

The record discloses that Bree S. Kelly was first employed as superintendent of said hospital on the 15th of June, 1925, and continued to act as superintendent under yearly contracts, from that time until the decree was entered in this cause. There appears to be some question as to whether her contract for the current year expired May 2nd, 1929, or May 31st 1929, but no contention is made by appellees that her yearly contract had expired at the time of her alleged discharge, or at the time of the filing of the bill or entering of the decree in this proceeding. In her answer appellant denies that she was legally discharged; that she withheld the keys and records of the institution, or that there was any disorder or confusion in the hospital on account of her intermeddling.

Appellant does not deny the right of appellee to discharge her prior to the expiration of her contract, for a sufficient reason or for ~~xxxxxxx~~ an insufficient reason, but insists that said hospital belongs to the city of Ottawa, and that the bill should have been filed, if otherwise proper, by the city instead of by the said Board of Trustees. In support of this contention our attention has been called to the case of Johnston v. City of Chicago, 258 Ill. 494-497. We have examined this case and do not think it is decisive of the question as contended by appellant; there is nothing in the opinion in said cause, as we view it, that would authorize us to hold that appellees were not the proper ones to institute this proceeding. It will be remembered that the title to the property is not involved in this cause.

It is in effect admitted by appellant that the Board of Trustees of said hospital have the power and authority to discharge her. It would seem to follow that if they had such power, and if appellant was interfering with the management of the institution, or with her successor, appointed by the Trustees, the Board of Trustees would have the right to apply to a court of equity to enjoin appellant from so interfering.

The record discloses that Bree S. Kelly was first employed as superintendent of said hospital on the 15th of June, 1922, and continued to act as superintendent under yearly contracts, from that time until the decree was entered in this cause. There appears to be some question as to whether her contract for the current year expired May 2nd, 1929, or May 31st 1929, but no contention is made by appellees that her yearly contract had expired at the time of her alleged discharge, or at the time of the filing of the bill or entering of the decree in this proceeding. In her answer appellant denies that she was legally discharged; that she withheld the keys and records of the institution, or that there was any disorder or confusion in the hospital on account of her intermeddling.

Appellant does not deny the right of appellee to discharge her prior to the expiration of her contract, for a sufficient reason or for ~~xxxxxx~~ an insufficient reason, but insists that said hospital belongs to the city of Ottawa, and that the bill should have been filed, if otherwise proper, by the city instead of by the said Board of Trustees. In support of this contention our attention has been called to the case of Johnston v. City of Chicago, 258 Ill. 444-447. We have examined this case and do not think it is decisive of the question as suggested by appellant; there is nothing in the opinion in said cause, as we view it, that would authorize us to hold that appellees were not the proper ones to institute this proceeding. It will be remembered that the title to the property is not involved in this cause.

It is in effect admitted by appellant that the Board of Trustees of said hospital have the power and authority to discharge her. It would seem to follow that if they had such power, and if appellant was interfering with the management of the institution, or with her successor, appointed by the Trustees, the Board of Trustees would have the right to bring to a court of equity to enjoin appellant from so interfering.

It was the duty of the members of the Board of Trustees of the hospital to manage it, and whatever personal interest, appellant or appellees might have or inject in this proceeding, is subservient to, and of no consequence, considering the rights of the public, that the hospital might be properly maintained and conducted, so as to render the best service possible. The Board of Trustees of the hospital had the power to adopt by-laws and rules of regulation, which are reasonable and consistent with the general purposes of the hospital.

Cahill's R.S. 1927, Chap. 24, Sec. 576 provides: "The directors shall, immediately after their appointment meet to organize by the election of one of their number president and one as secretary and by the election of such officers as they may deem necessary. They shall make and adopt such by-laws, rules, and regulations for their own guidance and for the government of the hospital as may be expedient, and not inconsistent with acts and ordinances of said city. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the "Hospital Fund", and of the supervision, care and custody of the grounds, leases and buildings, constructed, leased or set apart for that purpose, and all moneys received for such hospital shall be deposited in the treasury of said city to the credit of the "Hospital Fund" and drawn upon by the proper officers of said city upon the proper authenticated vouchers of said hospital board. Said board shall have the power to purchase or lease ground, to occupy, lease or erect appropriate building or buildings, for the use of said hospital; said board shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees, and shall in general carry out the spirit and intent of this act in establishing and maintaining a public hospital, and one or all of said directors shall visit and examine said hospital at least twice each month and make monthly reports of its condition to the city council."

It was the duty of the members of the Board of Trustees of the hospital to manage it, and whatever personal interest, appellant or appellees might have or lapsed in this proceeding, is subservient to, and of no consequence, considering the rights of the public, that the hospital might be properly maintained and conducted, so as to render the best service possible. The Board of Trustees of the hospital had the power to adopt by-laws and rules or regulation, which are reasonable and consistent with the general purposes of the hospital.

Cahill's R.S. 1927, Chap. 24, Sec. 372a provides: "The directors shall, immediately after their appointment meet to organize by the election of one of their number president and one as secretary and by the election of such officers as they may deem necessary. They shall make and adopt such by-laws, rules, and regulations for their own guidance and for the government of the hospital as may be expedient, and not inconsistent with acts and ordinances of said city. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the "Hospital Fund", and of the preservation, care and custody of the grounds, leases and buildings, constructed, leased or set apart for that purpose, and all moneys received for such hospital shall be deposited in the treasury of said city to the credit of the "Hospital Fund" and drawn upon by the proper officers of said city upon the proper authenticated vouchers of said hospital board. Said board shall have the power to purchase or lease ground, to occupy, lease or erect appropriate buildings or buildings, for the use of said hospital; said board shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees, and shall in general manage and the spirit and intent of this act in establishing and maintaining a public hospital, and one or all of said trustees shall visit and examine said hospital at least twice each month and make monthly reports of its condition to the city council."

There was placed upon the members of the Board of Trustees the duty to manage, and they were authorized to appoint a superintendent or matron. The trustees were the sole judges of the qualifications of such appointee, and of the conduct of such appointee and could remove her at any time, for any cause or for no cause, of course being liable in damages, if any, for breach, if any, of the contract.

We are of the opinion therefore that since such power was lodged with the trustees they were the proper persons, if, in their judgment an appointee was not doing the things which were for the best interest of the institution, to relieve her from further duties as such appointee.

It is also contended by the appellant that the appellees did not offer to do equity in the bill; that is that they did not tender appellant whatever amount might be owing to her as such superintendent of the hospital. In so far as the decree has the effect of barring appellant from any action for damages she might have for being discharged before the termination of her contract, it is too broad, and should be so modified as not to interfere with her right in this connection.

There was some evidence tending to show that appellant had offered to resign upon being paid a certain sum. Before such resignation had been accepted however, she withdrew the same, and we are of the opinion that having withdrawn her resignation before it was accepted, her claim for damages, if any, for being discharged would not be affected by such offer to resign.

We are of the opinion that the decree should be modified so as to protect the rights and interests of appellant in the event she seeks to recover damages for being discharged before the termination of her contract of employment. The decree will be so modified and affirmed.

The cause is reversed and remanded with directions to modify the decree as herein indicated.

Reversed and remanded with directions.

There was placed upon the members of the board of Trustees the duty to manage, and they were authorized to appoint a superintendent or matron. The trustees were the sole judges of the qualifications of such appointee, and of the conduct of such appointee and could remove her at any time, for any cause or for no cause, of course being liable in damages, if any, for breach, if any, of the contract.

We are of the opinion therefore that since such power was lodged with the trustees they were the proper persons, if, in their judgment an appointee was not doing the things which were for the best interest of the institution, to relieve her from further duties as such appointee.

It is also contended by the appellant that the appellees did not offer to do equity in the bill: that is that they did not tender appellant whatever amount might be owing to her as such superintendent of the hospital. In so far as the decree has the effect of barring appellant from any action for damages she might have for being discharged before the termination of her contract, it is too broad, and should be so modified as not to interfere with her rights in this connection.

There was some evidence tending to show that appellant had offered to resign upon being paid a certain sum. Before such resignation had been accepted however, she withdrew the same, and we are of the opinion that by doing this she waived her resignation before it was accepted, her claim for damages, if any, for being discharged would not be affected by such offer to resign.

We are of the opinion that the decree should be modified so as to protect the rights and interests of appellant in the event she seeks to recover damages for being discharged before the termination of her contract of employment. As so modified the decree will be so modified and affirmed.

The cause is reversed and remanded with directions to enter the decree as herein indicated.

Reversed and remanded with directions.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and twenty-_____

_____

Clerk of the Appellate Court

(53761—3M—7-27)

Opinion filed Jan 24-1929
Rehearing denied
Jan 10-1930

255 I.A. 6 3

General No. 8261 Agenda No. 46

Ora Gridley, Appellee.

vs.

John H. Wood, et al.

American State Bank, Corn Belt Bank, Paul F. Beich and Herbert Livingston, Appellants

Appeal from McLean

NIEHAUS, PJ.

Ora Gridley the appellee filed a bill of complaint in the circuit court of McLean county against John H. Wood and others for the enforcement of a lien against real estate for unpaid alimony due her. The bill contains the following allegations:

Prior to the 18th of October, 1902, she was the wife of Edward B. Gridley. That on the 18th of October, 1902, oratrix sued for divorce in the Circuit Court of McLean County, in chancery cause No. 8352. A decree of divorce and alimony in favor of oratrix was rendered, which decree was afterwards amended and is still in full force and effect. Said decree provided for alimony but not in lieu of dower of $1,800 per year from the first of September, 1902, payable quarterly. That said decree further ordered and adjudged that the alimony to be paid to your oratrix should, in case of the death of Gridley, be binding upon his heirs, executors and administrators until complainant's dower should be assigned to her in the estate of Edward B. Gridley owned and possessed by him at the date of the filing of the bill, unless otherwise ordered by the Court; provided, however, in case of death of Edward B. Gridley, alimony should thereafter be at the rate of $900.00 per year until the dower in the estate of Edward B. Gridley should have been assigned. That said Edward B. Gridley died January 7, 1914, having paid to your oratrix all alimony that accrued to her to said date, and that said quarterly payments, until further order of the Court, were made a lien upon said real estate until Edward B. Gridley should execute a good and sufficient mortgage upon sufficient real estate, to be judged sufficient by the Court, or until he should give to your oratrix a good and sufficient bond for the payment of the alimony in said sum, and

with sureties to be acceptable to your oratrix or approved by the Court, copy of which original decree is attached and marked "Exhibit A." That said Edward B. Gridley never did execute any mortgage or bond. That prior to the death of Edward B. Gridley, in the month of May, 1903, he filed his petition in this Court asking the Court to modify the decree for divorce and alimony by transferring the lien, and also your oratrix' inchoate right of dower, from certain real estate described in the decree to other real estate. That said Edward B. Gridley, with his petition, filed a written stipulation or contract agreeing to transfer the lien for the payment of said installments and for the transfer of oratrix' inchoate right of dower from certain property described in the original decree, a copy of which petition and stipulation is hereto attached and marked "Exhibit B." May 2, 1903, pursuant to petition and stipulation, this Court entered a decree ordering the transfer of said lien and the inchoate right of dower, as prayed for, a copy of which decree is hereto attached and marked "Exhibit C." That prior to his death, in the month of October 1909, said Edward B. Gridley filed his petition in said cause for further modification of the original decree for divorce and alimony, and the said supplemental decree, so as to provide that he might encumber certain real estate upon which lien for your oratrix' payment of alimony rested, to other real estate, and also transfer to the other real estate your oratrix' inchoate right of dower in said real estate. That Edward B. Gridley filed with his last mentioned petition, a written agreement bearing date October 18, 1909, that said lien and her inchoate right of dower might be transferred and attached to other real estate which he then owned. That he then owned the entire title and fee simple to Lots 13 and 14 in Subdivision of Lots 50 to 54, inclusive in the Original Town of Bloomington, McLean County, Illinois, which property was subject to the lien of your oratrix for alimony and subject to her inchoate right of dower. Reserving an estate for his own, the said Edward B. Gridley conveyed to one John H. Wood. That said John H. Wood then and there, on October 18, 1909, amended to said contract a stipulation of said Edward B. Gridley, as follows: "I, the said John H. Wood, the holder of the legal title of all the real estate described herein, consent and agree to the above. In witness whereof I have hereunto set my hand and seal, the 18th day of October, 1909. John H. Wood. Seal." Pursuant to said petition of Edward B. Gridley and his stipulation and the consent of John H. Wood, this Court modified the original and supplemental decree by decreeing and ordering said original and supplemental decree to be modified so that your oratrix' lien for alimony upon the undivided half of the East Half of the Southeast Quarter, and the Southeast Quarter of the Northeast Quarter of Section 27, Town 24 North, Range 1 East of 3rd P. M., McLean County, Illinois, be and the same was transferred to said Lots 13 and 14 of the Subdivision of Lots 50 to 54, inclusive, in the Original Town of Bloomington; further ordering and decreeing that the inchoate right of dower in the first described real estate, to the amount of $12,000, be transferred to said Lots 13 and 14, so that in case of the death of Edward B. Gridley, leaving your oratrix surviving him she, in addition to her dower in said mentioned real esate, should have additional dower interest therein to the amount of $4,000, provided,

however, that if the said Edward B. Gridley should pay off and discharge the proposed encumbrance, complainant's right of dower in the land encumbered should be restored and not transferred as herein provided. It was further ordered by said supplemental decree filed October 22, 1909, that said contract of Edward B. Gridley, filed with last mentioned petition, bind him and the said John H. Wood, their heirs, administrators and executors, to the full extent therein said decree provided, a copy of which last mentioned petition and decree is hereto attached and marked "Exhibit D." Said Edward B. Gridley, by his last will, appointed John H. Wood, executor, and that he qualified and acted as such. And the said John H. Wood was made the sole legatee under said will. That John H. Wood paid your oratrix alimony at the rate of $900 per year from and after Edward B. Gridley's death up to the quarter beginning April 1, 1916, and that in certain partition proceedings in this Court, entitled "Mary Gridley Bell by her conservator v. John H. Wood," No. 11650, and cause entitled "Logan A. Gridley by John H. Wood," No. 11651, the cash value of her dower in all lands of said Edward B. Gridley, except said Lots 13 and 14, and all alimony to which she was entitled under the decree for divorce, and for alimony at the rate of $900 per year after the death of Edward B. Gridley, was paid to her up to January 1, 1918, out of the proceeds of the sale of said partitioned property. And that she now has an inchoate dower only in said Lots 13 and 14, and that her lien for alimony due her for the period commencing January 1, 1918, with lawful interest on the several installments after they became due under the said decree, and until her dower in said lots shall have been assigned to her, rests entirely upon said Lots 13 and 14. That said John H. Wood has paid your oratrix no alimony for the period commencing January 1, 1918, down to the date of the filing of this bill, and there is now due her five years' alimony at the rate of $900 per year up to the first day of January, 1923, amounting to $4,500, and that he has paid her none of the rents or profits accruing to him from said Lots 13 and 14 which are improved, and are known as 108-110 East Front Street. That he has never assigned to your oratrix her dower therein, either in gross or in common, or in any other manner whatever, although your oratrix' petition is on file in this Court praying for the assignment of said dower.

The appellants made a motion to dismiss the bill of complainant on the ground that it showed laches and wilful neglect on the part of the appellee to have a dower assigned in the premises subject to the lien; also laches in not enforcing her claim for alimony during the life time of John H. Wood; also on the ground that the court had no jurisdiction to

enforce the alimony decree. The court denied the motion and thereupon the appellants filed their answer to the bill, which contains five paragraphs. The appellee filed a replication to the answer and the case was thereupon referred to the Master in Chancery. The Master in Chancery reported the evidence taken, and found that the equities in the case were with the complainant; and that she was entitled to a decree to enforce her lien against the premises in question, for the alimony remaining unpaid. Objections were filed to the Master's findings; and under the order of the court the objections were allowed to stand as exceptions. Upon the hearing of the case, the court overruled the exceptions, and rendered its decree. The decree finds the amount of the arrears of alimony for the period from Jan. 1, 1918, including the payment due September 30, 1925, with interest, to be $9131.75; and thereupon ordered that the appellee should be paid that amount within five days, together with lawful interest from the date of the decree; and that upon failure to pay the same, the real estate involved, be sold for cash to the highest bidder. The sale to be subject however to the installments of alimony accrued and to accrue to the appellee in the decree in cause No. 8352, from and including the first of October, 1925, until said decree for alimony in cause No. 8352 be satisfied in full; also subject

to the dower rights of the appellee. The decree further provides, that the lien upon the premises as provided for by the divorce decree in Gridley v. Gridley, Chancery No. 8352, is preserved and shall not in any wise be impaired by the decree of sale in this cause. And the decree also provides, that if no redemption is made, the Master issue a deed to the purchaser, subject to lien rights of appellee in reference to installments of alimony accrued and to accrue to the appellee under the decree of alimony after October 1st, 1925; and subject to her dower right in said premises. This appeal is from the decree.

Appellants defense to the appellee's claim of lien and the right to enforce the same is set forth in the five paragraphs of their answer. And we will therefore consider the questions raised by paragraphs referred to.

It is averred in the first paragraph, 'that they were creditors of Wood, and that their claims had been allowed against the estate of John Wood to the amount of $15000.00; that the estate of John Wood is insolvent, and that the premises described in the bill were sold under foreclosure proceedings. That the widow of John H. Wood and his estate were unable to redeem said property; and that for the purpose of saving themselves loss of money due to them from said estate, they purchased

the certificate of purchase for $14241.31, being the amount due thereon; and that the title was taken in the name of Herbert M. Livingston for convenience. That the appellants voluntarily agreed among themselves to sell said real estate, as soon as the same could be advantageously sold, and that out of the proceeds realized, each was to be repaid the amount of money advanced for the purchase of said certificate of purchase and the outlay, insurance, taxes, and other expenses, and the payment in full of the indebtedness due them from John H. Wood; and that the surplus should be paid to Carrie E. Wood as executrix and widow of John H. Wood in proper proportion. That this agreement was voluntary on their part, and that the appellants intend not to profit by the purchase of said real estate over and above the repayment of the moneys due them; and that they intend to carry out said plan voluntarily undertaken.'

Concerning the matters set up in the first paragraph of appellants' answer, it may be said that it does not constitute any defense to appellee's claim of lien, nor to her right to enforce the same, because the proofs show, that lien provided for in the alimony decree as well as the decree itself, was in full force and effect at, and during, the time of the occurrences and transactions referred to in this paragraph which involved the

rights of the creditors in and to the real property of John H. Wood which was subject to the lien in question; and that the lien had become legally effective upon this property in the life time of John H. Wood; that Wood had become a party to the alimony decree and to the placing of the lien upon the premises as holder of the legal title; and had expressly consented and agreed to the transfer of the lien from other real property of Edward B. Gridley to the premises in question. The validity and binding force of the lien as well as the right to enforce the same against the premises had become and were **res adjudicata** before and at the time of the death of John H. Wood; and hence had the same legally binding effect upon his estate, as well as the rights and interests of all who claim title, or rights or interest under the Wood title; and that any lien involved in the foreclosure proceedings mentioned in the paragraph referred to was therefore necessarily subordinate and subsequent to the lien provided for in the alimony decree which is sought to be enforced in this proceeding. **Gridley v. Wood** 215 Ill. App. 473; **Mary Gridley Bell v. Wood** 215 id. 658; **Wilson v. Smart** 324 Ill. 280.

The second paragraph of the answer alleges, that the appellee is not entitled to enforce her lien to secure her unpaid alimony, because she was guilty of laches in not

having pressed the suit which she commenced in the circuit court of McLean county for the assignment of her dower in the premises involved, to a conclusion; that this dower suit had been referred to the Master in Chancery to take evidence; but that no proofs had been taken; and no other action for the purpose of effectuating the assignment of the dower had been taken in the suit; and no further proceedings were had except the dismissal of the defendants therefrom, which appellants claim amounted to a dismissal of the suit. These matters however do not constitute legal laches on the part of appellee; and do not bar her right to the lien in question. The Statute made it the duty of John H. Wood to assign appellee's dower in the premises in question. The provision of the Dower Act is, that "it is the duty of the heir at law or other person having the next estate of inheritance or free hold in any lands or estate of which any person is entitled to dower to law off and assign such dower as soon as practicable after the death of the husband or wife of such person." Chap. 41 Par. 18 Smith-Hurd Rev. Stat. **Bonner v. Peterson** 44 Ill. 253; **Warner v. Warner** 235 Ill. 448. Wood failed to perform his statutory duty to have appellee's dower in the premises assigned, which would have stopped the further accruing of alimony; but apparently preferred to continue the payment of the amounts

of accruing alimony to appellee for over two years after the death of Edward B. Gridley at the rate fixed by the decree, namely $900.00 per year. This is clearly set forth in **Gridley v. Wood, supra.** We conclude. that the neglect of the duty on the part of Wood in not assigning appellee's dower is chargeable to all parties who claim under him.

The third paragraph of appellants' answer sets up in defense to appellee's claim, that that part of the decree in the divorce proceedings of Ora Gridley v. Edward B. Gridley upon which the claim for alimony is based after Edward B. Gridley's death, is illegal; and that the court had no jurisdiction to render said decree so far as the appellants were concerned, which is a mere conclusion of law; and that the decree is so uncertain and equivical that the same is of no binding force or effect upon the appellants, which is obviously not in accordance with the fact; and that the enforcement of the decree is against public policy; and that to enforce the decree would be inequitable and against 'all equitable proceedings;' being in the nature of a penalty; and that the statute gives full remedy for failure to assign dower. It is apparent that there is no question of public policy involved in the enforcement of the decree in question, and that pleaders' conclusions about the enforcement being inequitable and in the

nature of a penalty are not well taken. The third paragraph does not embody any matters which may be regarded as a defense to appellee's right to the relief prayed for.

The fourth paragraph of appellant's answer avers, that the appellee had received the present cash value of her dower interest in other tracts of land; and therefore her demand for the amount of alimony due should be properly apportioned; and only so much of said alimony be allowed against the appellants as the value of the property here in question would bear to the entire value of the real estate in which the appellee was entitled to dower. The amount received by the appellee for her dower in premises other than those in question did not reduce the amount of alimony due her under the alimony decree; and the dower money was not received by her on account of or in payment of alimony due her. Under the alimony decree the appellee was entitled, after the death of her former husband, to $900.00 a year, until all of her dower in the different parts of the property subject to the lien for the unpaid alimony, had been assigned. Her dower in the premises in question having never been assigned to her, the alimony continued to accrue and to be a lien against the property in question. It is clear, that the matters set up in paragraph four referred to do not constitute any defense to appellee's claim for relief;

and the court therefore properly sustained an exception to this paragraph of appellants answer.

The fifth paragraph of appellants' answer merely amounts to a general denial of the allegations of fact in appellee's bill of complaint and does not set up any affirmative matters of defense.

The record does not disclose any error in the rendition of the decree; and the decree is therefore affirmed.

Abst

Opinion filed Oct 23-1929

255 I.A. 613

General No. 8310 Agenda No. 4

APRIL TERM, A. D. 1929

J. N. Moore, Individually, and J. N. Moore and Sylvia V. Moore, co-partners, doing business as Moore Adjustment Company, Plaintiffs in Error,

vs.

Charles C. Claar, Defendant in Error.

Writ of Error to the Circuit Court of Vermilion County

ELDREDGE, P. J.

Charles C. Claar, Defendant in error, filed his bill of complaint in the Circuit Court of Vermilion County for an accounting, making J. N. Moore, individually, and J. N. Moore and Sylvia V. Moore, co-partners doing a business as Moore Adjustment Company, defendants thereto. Personal service was had upon Sylvia V. Moore. The controversy arises over the service of the summons upon the defendant J. N. Moore. The original return of the sheriff on the summons is as follows: "I have duly served the within writ upon the within named J. N. Moore, individually, and also J. N. Moore and Sylvia V. Moore, doing business as the Moore Adjustment Company, by leaving a true copy thereof for J. N. Moore at his usual place of abode with Mrs. Sylvia V. Moore his wife a person of the age of ten years and upward, and a member of the family of the within named defendant J. N. Moore and at the same time making known to her contents thereof. This the.....

day of ..... 192....." It contains neither date nor signature. The defendants to the bill filed a special appearance for the purpose of quashing the service on said summons for the reason that it was not served upon J. N. Moore, by leaving a copy thereof at his usual place of abode with some person of the family of the age of ten years and upward. In support of said motion numerous affidavits were filed to the effect that J. N. Moore and his wife Sylvia V. Moore resided at 829 North Griffen Street in the city of Danville and, on the day that the summons was delivered to Sylvia V. Moore, she was visiting a friend who resided at 908 Anchor Street in said city, and that the copy left with her for service upon J. N. Moore was not left with her at the usual place of abode of the said J. N. Moore. Thereupon the sheriff asked leave to amend the certificate of service which was granted and the summons was amended so as to read as follows: " I have duly served the within writ upon the within named J. N. Moore, individually, and also J. N. Moore and Sylvia V. Moore, doing business as the Moore Adjustment Company, by leaving a true copy thereof at the residence of Mrs. J. C. Delbridge at 908 Anchor Street, Danville, Illinois, with Mrs. Sylvia V. Moore, his wife, a person of the age of ten years and upward, and a member of the family of the within named defendant, J. N. Moore, and at the same time making known to her the contents thereof. This 21st

day of September, 1928. C. B. Grimes, Sheriff, By R. Cunningham, Deputy." The defendants again filed a limited appearance and renewed their motion to quash the service of the summons which the court denied. The defendant Slyvia V. Moore filed a demurrer to the bill whereupon the complainant dismissed the bill as to her.

Plaintiff in error, J. N. Moore, neither entered a general appearance nor answered the bill but was defaulted and upon a hearing a decree was entered in favor of the complainant and against him.

A motion has been made in this court by defendant to strike all the affidavits, filed in support for the motion to quash the summons, from the records because they have not been preserved by a certificate of evidence. The transcript of the record does not contain any certificate of evidence. We held in the case of **Lyons v. Lyons**, 219 Ill. App. 620, as follows: "While it is true that in chancery cases motions made will be considered as part of the record, yet, when such motions require evidence to sustain them, such evidence must be preserved by certificates of evidence and filed in the case, for in no other way can it become a part of the record." The same rule is announced in the cases of **Lange v. Heyer**, 195 Ill. 420, and **DuQuoin Water Works v. Parks**, 207 Ill. 46. The affidavits filed in support

of the motion to quash the original summons and return thereon and also filed in support of the motion to quash the amended return have no place in the record and are stricken therefrom. But this will not avail the defendant in error anything. The statute specifically directs that where service is made by copy, the sheriff shall leave such copy at the defendant's usual place of abode with some person of the family, of the age of ten years or upward, and informing such person of the contents thereof. In the case of **Piggot v. Snell,** 59 Ill. 106, the return of the service did not show that the copy was left at the place of abode of the defendant, and the court held as follows: "This return is defective in not stating that the copy was left at the usual place of abode of Susan J. Piggot." The decree in that case was reversed on the ground that the court had obtained no jurisdiction of the person of the defendant. The summons and the return thereon, however, are parts of the record as is also the motion to quash the return of the service. The amended return of service made by the sheriff shows all the facts proven by the stricken affidavits and shows conclusively that there was no legal service obtained on the plaintiff in error, J. N. Moore. It is apparent from the record itself therefore, that the Circuit Court was without jurisdiction of the

plaintiff in error and that the decree entered is erroneous and must be reversed.

The decree of the Circuit Court is reversed and cause remanded.

Abstract
Opinions filed Oct 23-1929

255 I.A. 643

General No. 8322 Agenda No. 10

APRIL TERM, A. D. 1929

Oscar Nelson, Auditor of Public Accounts, Appellee
vs.
New Salem State Bank of New Salem, Illinois in Which Filed Claim of Griggsville National Bank of Griggsville, Illinois, Appellant,

Appeal from Circuit Court of Pike County.

ELDREDGE, P. J.

This appeal is wrongly entitled; it should be "The Griggsville National Bank of Griggsville, Illinois, Appellant, vs. Farmer's State Bank of Pittsfield, Illinois, Receiver etc., Appellee." The New Salem State Bank of New Salem, Pike County, was closed by the Auditor of Public Accounts on June 7, 1926, as hopelessly insolvent, and the Farmer's State Bank of Pittsfield was appointed receiver. The Griggsville National Bank filed its claim with the receiver for the sum of $14,900.61 on the theories of money had and received, money paid for the use of, money in possession of New Salem State Bank, property of the Griggsville National Bank, money equitably due from the New Salem State Bank to the Griggsville National Bank and also for credits furnished by the Griggsville National Bank to the New Salem State Bank. The Master in Chancery to whom the cause

was referred found the claim to be without merit and on a hearing of the exceptions to the Master's report the Chancellor also disallowed the claim.

It appears from the arguments of counsel for the different parties that one A. E. Dunham was a stockholder and depositor in the New Salem State Bank; that about a year before said bank failed, Dunham established an account with the Griggsville National Bank, and thereupon many checks of large amounts drawn by him on the New Salem State Bank were mailed to the Griggsville National Bank and his account in the latter bank credited with the amounts named in the checks; a corresponding number of checks aggregating practically the same amounts, drawn by Dunham on the Griggsville National Bank were sent by the New Salem State Bank to its depository, State Savings Loan and Trust Company at Quincy, for the credit of the New Salem State Bank. The Griggsville National Bank claims that all of these checks were forgeries. When the New Salem State Bank failed, there had been eight of such checks mailed to the Griggsville National Bank and credited to said Dunham by the Griggsville National Bank, and sent by the latter to its corresponding bank at St. Louis, Mo., to be

eventually paid by the New Salem State Bank when the checks should reach it. The Griggsville National Bank claims to have credited these checks to Dunham's account. The question in controversy on the hearing before the Master apparently was the issue only as to whether these checks were forgeries. Neither on the hearing before the Master nor before the Chancellor were these checks produced. The evidence shows that they all came into the possession of counsel for appellant who testified that he received them from the Griggsville National Bank, appellant, but that he could not produce them because he could not locate them. He further testified that if he did produce them they would incriminate his client, the Griggsville National Bank. Of what crime they tended to incriminate the Griggsville National Bank is not disclosed or in any manner explained. The attorney did not testify that he had made a thorough search for these checks, but stated that they were not where such things were usually kept in his office. In answer to a question of whether he would produce them if they came into his possession, he answered, "I can't say what my state of mind might be.' The basis of appellant's claim is that the checks in question were forged and it apparently takes the position that if it produces them they will tend to incriminate it

of forgery. In other words, it is seeking to take advantage of its own wrong. Such a contention is an absurdity and the Master and the Chancellor were clearly right in disallowing this claim. The decree should also be affirmed for other reasons. The transcript of the record is not a transcript such as the rules of this court require. It is simply a copy of a number of the papers filed in the case together with a mass evidence all tied together and not even arranged in chronological order. The brief and argument of appellant is a very meager document, and not a single page of the record or abstract is referred to in support of any of the facts discussed, which is also a direct violation of the rules of this court.

The decree of the Circuit Court is affirmed.

Abstract
Opinion filed Oct 22-1929
Petition for Rehearing denied
Jan 10-1930

255 I.A. 644

General No. 8328 Agenda No. 14

APRIL TERM, A. D. 1929

Gilbert Ramsey, Appellee

vs.

The New York, Chicago and St. Louis Railroad Company, Appellant.

Appeal from Vermilion

NIEHAUS, J.

Gilbert Ramsey appellee brought this suit against the New York, Chicago and St. Louis Railroad Company appellant herein, in the circuit court of Vermilion county, to recover damages for injuries to his person and to his automobile, alleged to have been caused by the passenger train operated by the appellant, which collided with the appellee's automobile on August 21, 1926, on the grade crossing located at the northerly limits of the village of Ridge Farm and the Dixie Highway. There was a trial by jury; and at the close of appellee's evidence, the court directed a verdict in favor of the appellant as to four counts of the declaration alleging negligence of the appellant as the cause of the collision; and thereupon the case was submitted to the jury on the issues raised by the three remaining counts of the declaration, which are referred to as the first and second counts and the fifth additional count. These three remaining counts purport to charge, that the injury in question was wilfully

and wantonly inflicted upon the appellee by appellant's servants who were in charge of the passenger train in question. The jury returned a verdict finding the appellant guilty under the counts referred to, and assessed appellee's damages at $7500. The appellant made a motion for a new trial which was denied by the court, and judgment was rendered on the verdict. This appeal is prosecuted from the judgment.

One of the errors assigned is, that the evidence does not sustain the finding of the jury by their verdict that the injuries which the appellee suffered, were wilfully and wantonly inflicted. Upon a careful review of the evidence in the record, we are unable to find sufficient proof of wilful or wanton conduct on the part of appellant's servants in the operation of the train which is alleged to have caused the collision. The verdict is therefore manifestly against the evidence on the vital issue in the case, and under the counts submitted to the jury.

Concerning the errors assigned on the instructions given for appellee, it may be pointed out, that instruction No. 2 is subject to the criticism made by the Supreme Court in **Chicago City Ry. Co. v. Jordan** 215 Ill. 390. The third instruction given for appellee, which recites the statutory duties of ringing a bell or blowing a whistle, is also erroneous when considered in connection with the other instruction concerning wilful and wanton conduct, in that a jury might

naturally conclude from the purport of the instruction that a neglect to comply with the statutory duties referred to would necessarily be wilful and wanton conduct in this case. Burns v. C & A R.R. Co. 229 Ill. App. 170; Enochs v. Trevvot 229 Ill. App. 235; O'Donnell v. Snyder 231 Ill. App. 581; Powell v. Kempton 231 Ill. App. 380;La Marre v. C.C. & St. L.217 Ill. App. 296; see also Brown v. Illinois Terminal Co. 319 Ill. 326. The 4th instruction contains an abstract proposition of law, which, though correct, was misleading in its effect in this case, because it assumes that the injuries in question resulted from a wilful and wanton act of appellant's servants, and that therefore contributory negligence was not a defense which the appellant could urge to prevent a recovery.

Concerning the Cross Errors assigned by the Appellee it must be pointed out that Court erred in directing a verdict for appellant on these counts which charged negligence. The issues joined on these counts should have submitted to the jury for deter-termination from the evidence adduced on the trial.

For the reasons herein before stated, the judgment is reversed and the cause remanded.

Reversed and remanded.

abstract-
Opinion filed Oct 23-1929

General No. 8321 Agenda No. 9

APRIL TERM, A. D. 1929

Winifred Behm, a Minor, by Charles Behm, Her Guardian and Next Friend, Appellant

vs.

City of Farmington, Illinois, a Municipal Corporation, Appellee.

Appeal from City Court of Canton, Fulton County.

NIEHAUS, J.

Winifred Behm, a minor, by Charles Behm, her guardian and next friend, commenced this suit in the city court of Canton; being an action of trespass on the case, against the appellee city of Farmington, to recover injuries sustained by her being struck or kicked by a vicious horse which was upon one of the streets of the city of Farmington, and which, it is alleged, at the time of the injury was under the control charge and dominion of an employe of the city. The appellant's right of recovery is set forth in four counts of amended declaration, which was filed in the cause, and to which a general demurrer was sustained by the court. Appellant elected to stand by the amended declaration, and judgment upon the demurrer was entered by the court, from which this appeal is prosecuted.

The general demurrer raises the question whether any of the counts relied upon by the appellant for recovery for the injury sustained state a cause of action. And we shall consider

these counts in their order with that question in mind.

The averment in the first amended count is that the city of Farmington did wrongfully and injuriously keep and use a certain horse which had a vicious temper which was well known to the city; that afterwards on the 30th day of September, 1927, this horse 'while hitched to a wagon and being used upon the city streets of the city of Farmington and under the control charge and dominion of an employe of the city did attack strike and kick the appellant.' There is no averment in this count of facts to show that while the horse in question was hitched to the wagon and used on the streets of the city under the dominion charge and control of the city's employe, the employe was engaged in the business or occupation of the city of Farmington; or was used upon the city streets in a transaction business or occupation of a character and kind that a city as a municipal corporation engaging therein, would become liable for any negligent acts of its employes under the doctrine of respondeat superior. **Johnson v. The City of Chicago** 258 Ill. 494. The same objection applies also to the second count of the amended declaration.

The third count aims to state a violation of duty on the part of the city of Farmington, namely, that it was the city's duty to keep the street or highway in question in a safe state of repair and in good condition, and that the city disre-

garded its duty in that behalf on the day of the injury to the appellant, in that it wrongfully and negligently 'suffered and permitted at a regular intersection or crossing from the south to the north side of the street to be obstructed by a wagon and a team of horses under the control charge and supervision of an agent servant or employe of the city; and that one of said horses of the team attached to the wagon, being a horse of vicious temper well known to the city; by means whereof the appellant who was then and there passing along and upon said crossing and using said street and crossing with all due care and diligence, was attacked struck and kicked by the horse attached to the wagon obstructing said street.' Assuming that the appellant correctly stated the duty resting on the city, to keep its streets "in a safe state of repair and in good condition," and that it was a disregard of such duty to suffer or permit such streets to be obstructed by a wagon and team of horses at an intersection or crossing, it is clear, that the fact, that the appellant was attacked struck and kicked by a vicious horse constituting a part of such alleged obstruction was not a necessary or probable result of the alleged violation of duty, to keep the streets of the city in a safe condition of repair and in good condition; or the alleged negligence of the city in permitting the obstruction at the crossing by the wagon and team of horses.

The appellant's injury was not the proximate cause of the alleged violation of the duty referred to. The same objection pertains also to the fourth amended count. "The essential elements of actionable negligence are, first, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform that duty that the failure is the proximate cause of the injury." Puterbaugh Pleading and Practice (9th Ed.) 780; **Hartnett v. Boston Store of Chicago** 265 Ill. 331. In Hartnett v. Boston Store of Chicago **supra,** the court in defining proximate cause said: "What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission, and to be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence; although it is not essential that the person charged with negligence should have foreseen the precise injury that might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition cause an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury."

For the reasons stated, we are of opinion, that none of the four amended counts of appellant's declaration state a cause of action against the city of Farmington; judgment is therefore affirmed.

Judgment affirmed.

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A

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM, A. D. 1929

TERM NO. 1. AGENDA NO. 12.

FRANKLIN COUNTY BUILDING & LOAN ASSOCIATION, a Corporation,
Defendant in Error, :

VS. :

T. I. GALLOWAY AND JENNIE GALLOWAY,
Plaintiff in Error. :

ERROR TO THE CIRCUIT COURT OF FRANKLIN COUNTY.

WOLFE, J.

This was a suit by the Franklin County, Building and Loan Association, et als., filed in the Circuit Court Franklin County to the May Term 1927. The pleadings and facts in this case with the exception of the names of some of the defendants are identical with the case of Franklin County Building & Loan Association, a corporation, vs. D. W. Blood, et als. T. I. Galloway and Jennie Galloway filed in this court, May Term, A. D. 1929 case No. 29 Agenda No. 23.

The assignments of error and the legal questions are identical in both suits and the ruling of the court and the reasons therefore in the former case are adopted by the court in this case. We find no reversible error in this case and the judgment of the Circuit Court of Franklin County is hereby Affirmed.

AFFIRMED.

Not to be reported in full.

L

A

3a

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A. D. 1929

TERM NO. 31. AGENDA NO. 9.

SIDNEY BROWN, et al.,
Appellants,

VS.

FRANK KIENSTRA, et al.,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY.

WOLFE, J.

The appellees, Frank Kienstra, and Joseph Kienstra, are partners and are the plaintiffs in this suit which was before a Justice of the Peace in Madison County. Originally there were three defendants, but at the time of the trial before the Justice of the Peace the case was dismissed as to J. F. Wagner, The suit is based upon a promissory note. Trial was had before a Justice of the Peace and appealed to the Circuit Court of Madison County and tried in that Court. A verdict was rendered by the jury in favor of the plaintiffs for $189.14. After motion for a new trial was argued and denied, judgment was entered on the verdict for the plaintiffs for the sum of $189.14.

The note in question on which the suit is based was signed by J. F. Burger, Ben Weber and appellant Sidney Brown, made payable to the Columbia Motor Sales Company for the sum of $152.00, with the interest, etc., dated November 19, 1925, due eight months after date. On the back of the note was the endorsement, "Columbia Motor Sales Company per H. H. Clark, Manager.

Frank T. Kienstra, one of the Plaintiffs below, testified that he and his brother were in partnership and that the note had been properly assigned to them for a debt that was then

owing from the Columbia Motor Sales Company to the plaintiffs, and that the note had not been paid. The note itself was introduced in evidence.

The defendant Sidney Brown testified that he received nothing for signing the note, and only signed it as surety for Joe Burger to purchase an automobile from the payee of the note. Defendant Brown also introduced seventeen receipts signed by the Columbia Motor Sales Company, claiming that the receipts represented payments made by one of the makers on the note. The only defense that Brown made was that the note had been paid.

In rebuttal the plaintiffs called H. H. Clark, a member of the Columbia Motor Sales Co., at the time of the making of the note, who testified that the receipts offered in evidence by the defendant were not part payments on the note, but were accepted by the Columbia Motor Sales Co., as payment on an open account that was owing the Company by the defendant Burger. This was the only evidence offered in the case. It is first contended by the appellants that the verdict is contrary to the evidence in the case. The jury had the advantage of seeing and hearing the witnesses testify, and they by their verdict have found the plaintiffs were entitled to recover, and unless the verdict is against the manifest weight of the evidence this Court will not disturb their verdict. From an examination of the evidence we cannot say that this verdict is against the weight of the evidence.

It is next contended that plaintiff's instruction No. 2 should not have been given as it directs a verdict and omits the defense of payment. No doubt in some cases it would be error to give this instruction, but in this case it is conceded by the appellants in their printed brief and arguments that the plaintiffs were holders of the note in due course and being such holders in due course, before the defense of payment would be available to the defendant it would be necessary for them to

prove that they paid the holder of the note, but the evidence discloses that all of the payments were made to the Columbia Motor Sales Company and not to the legal holders of the note.

We are of the opinion that there is sufficient evidence to sustain the verdict and the giving of the instruction was not error.

The judgment of the Circuit Court of Madison County is hereby

AFFIRMED.

Not to be reported.

STATE OF ILLINOIS.

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1928.

TERM NO. 20 AG. NO. 40.

255 I.A. 645

BERTHA WALSH, Defendant in Error,	:	ERROR TO
V.	:	EAST ST. LOUIS
E. E. MOORE, et al., Plaintiffs in Error.	:	CITY COURT.

Barry, P. J. - Bertha Walsh sued to recover for personal injuries charged to have been caused by general negligence in operating an automobile in which she was riding as an invited guest of plaintiffs in error; and by negligently driving the car knowing the brakes were in a defective and dangerous condition, by reason whereof the car was driven with great force against a tree near the highway, etc. In addition to the general issue a special plea was filed by E. E. Moore to the effect that at the time in question the car was not operated by him or by his agent or servant. There was a verdict and judgment for $2,000.00.

Plaintiffs in error are husband and wife and live at Mattoon. They are friends of defendant in error and her husband who reside at East St. Louis. Mr. and Mrs. Richardson are mutual friends and their home is at Hillsboro. The Moores' owned an automobile, jointly, and about May 24, 1925, drove from their home to East St. Louis where they visited defendant in error and her husband for a week. On May 30 Mrs.

STATE OF ILLINOIS.
APPELLATE COURT
FOURTH DISTRICT.

OCTOBER TERM, A. D. 1928.

TERM NO. 20 AG. NO. 40.

BERTHA WALSH, Defendant in Error,	:	ERROR TO
V.	:	EAST ST. LOUIS
M. E. MOORE, et al., Plaintiffs in Error.	:	CITY COURT.

Barry, P. J. - Bertha Walsh sued to recover for personal injuries charged to have been caused by general negligence in operating an automobile in which she was riding as an invited guest of plaintiffs in error; and by negligently driving the car knowing the brakes were in a defective and dangerous condition, by reason whereof the car was driven with great force against a tree near the highway, etc. In addition to the general issue a special plea was filed by M. E. Moore to the effect that at the time in question the car was not operated by him or by his agent or servant. There was a verdict and judgment for $3,000.00.

Plaintiffs in error are husband and wife and live at Mattoon. They are friends of defendant in error and her husband who reside at East St. Louis. Mr. and Mrs. Richardson are mutual friends and their home is at Hillsboro. The Moores owned an automobile, jointly, and about May 24, 1928, drove from their home to East St. Louis where they visited defendant in error and her husband for a week. On May 30 Mrs.

Moore and others drove to Hillsboro and brought the Richardsons to the Walsh home in East St. Louis. The next day Mr. Moore asked defendant in error to go to Hillsboro with his wife to take the Richardsons home. She agreed to go and the parties left the Walsh home about 3 P.M. with Mrs. Moore driving the car.

Mrs. Moore says that when driving down a hill about two blocks out of Greenville the car started to leave the road when it was about 50 feet from a tree that stood in a little gully about eight or nine feet to the right of the beaten track. She says she tried to apply the brakes, but they did not work; that she had no chance to slacken her speed before the car hit the tree. There is no conflict in the evidence. Mrs. Moore admitted that two or three days before the accident she took the car to the White garage to see what was the matter with it; that Mr. White tested the brakes and told her they were in bad condition and should be adjusted and for her to come back at a certain time and he would fix them. They were not adjusted or repaired prior to the accident in question.

In view of the undisputed evidence there is no merit in the contention that Mrs. Walsh was injured as a result of a mere accident without negligence on the part of plaintiffs in error; nor did the court err in refusing to instruct the jury that if the injury occurred through mere accident without any fault of plaintiffs in error, she could not recover. It clearly appears that the injury was due to negligence in operating the car with defective brakes while defendant in error was in the exercise of due care for her own safety. The court did not err in refusing to direct a verdict and no reversible error having been pointed out the judgment is affirmed.

d to be reported

AFFIRMED.

Moore and otherwise, in Hillsboro and largely the defendants to the claim here in dispute. Moore, my Moore asked defendant in error to go to Hillsboro with his wife to take the stockyards car. He agreed to go and the parties left the Hillsboro car at S.E. 4th St., Moore driving the car.

Mrs. Moore says that when driving down a hill about two blocks out of Greenville the car started to go on the road when it was about 30 feet from a tree that stood in a little gully about eight or nine feet to the right of the beaten track. She says she tried to apply the brakes, but they did not work; that she then attempted to slacken her speed before the car hit the tree. There is no controversy in the evidence. Mrs. Moore admitted that she or Mrs. Hyde before the accident and been the car to the Hillsboro garage to see what was the matter with it; that Mr. Hyde tested the brakes and told her they were in bad condition and should be adjusted and for her to come back at a certain time and he would fix them. They were not tested or inspected prior to the accident in question.

In view of the unchallenged evidence there is no merit in the contention that the plaintiff was injured as a result of a mere accident without negligence on the part of plaintiffs in error; nor did the court err in refusing to instruct the jury that if the injury occurred through mere accident without any fault or negligence, she could not recover. It clearly appears that the injury was due to negligence in operating the car which caused it to swerve while defendants in error was in the exercise of due care for her own safety. The court did not err in refusing to direct a verdict and in overruling the motion for a judgment in accordance therewith.

NO. 5. AGENDA NO. 27.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

May Term, A. D. 1929

255 I.A. 645

AMERICAN NATIONAL BANK OF MOUNT CARMEL, ILLINOIS, Plaintiff in Error,	Writ of Error to the Circuit Court of Wabash County.
vs.	Hon. Roy E. Pearce, Presiding Judge.
ROBERT WOOLARD and MARY M. WOOLARD, Defendants in Error.	

OPINION BY NEWHALL, J.

Plaintiff in error recovered a judgment by confession on a judgment note signed by defendants in error as makers for the principal sum of nine thousand dollars made in favor of First State Bank of Mount Carmel as payee and by endorsed to plaintiff in error.

On motion of defendants in error the judgment was opened and leave given them to plead to the declaration. Prior to the trial it was stipulated between the parties that defendants in error should have the right to interpose any defenses to said note that they might have interposed had said suit been brought in the name of the said State Bank and that said defenses might be made under the plea of the general issue which was filed in said cause.

No. 3 AGENDA NO. 2

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

W. T. R., J. B. JONES

95 I.A. 645

AMERICAN NATIONAL BANK OF MOUNT CARMEL, ILLINOIS, Plaintiff in Error,	Writ of Error to the Circuit Court of Wabash County.
vs.	Hon. Roy E. Barnes, presiding Judge.
ROBERT COOLEY and MARY COOLEY, Defendants in Error.	

OPINION BY MCGLYNN, J.

Plaintiff in error recovered a judgment by confession on a judgment note signed by defendants in error as makers for the principal sum of nine hundred dollars and in favor of First State Bank of Mount Carmel as payee, and to enforced to plaintiff in error.

On motion of defendants to quash the judgment and leave given them to plead to the declaration, prior to the entry of the mentioned judgment, the motion that defendants in error demonstrate the right to set aside any defense to said note, that they might have had said authority through the same as the said [illegible] that said judgment [illegible] the general issue [illegible] the plea to said [illegible].

Trial was had before a jury and a verdict rendered finding the issues for the plaintiff in error and finding the amount of plaintiff's damages in the sum of four thousand dollars. Plaintiff in error made a motion at the close of all the evidence for a directed verdict in favor of plaintiff in error for the amount of the original judgment as confessed in the sum of ten thousand onehundred seventy two dollars and fifty cents, being the principal, interest and attorney's fees due plaintiff in error according to the tenure of said note as of the date of the entry of judgment by confession. The motion for a directed verdict was refused by the trial court and error is assigned on the court's ruling. After motion for a new trial by plaintiff in error was made and overruled by the court a judgment was entered confirming the original judgment to the extent of four thousand dollars, (being the amount of the jury's verdict), as of October 20th, 1924, the date of the entry of the original judgment by confession.

Plaintiff in error contends that there is no competent evidence in the record tending to show that defendants in error had a legal defense to any portion of the indebtedness due on the note in question and that the trial court erred in not directing a verdict in favor of plaintiff in error for the full amount of the principal of the note, interest and attorney's fees.

Defendants in error contend that the evidence shows that in previous renewals of notes given by them to the State Bank that two notes for the sum of $2,500.00 each were included in such renewals and that they had subsequently paid each of the $2,500.00 notes and therefore should be given credit on the note in question. It is also contended by defendants in error that in the making of said renewal notes they were executed for $5,000.00 more than defendants in error owed said State Bank as an accommodation to it in order to enable the State Bank to borrow money for its use by discounting said notes with the Federal Reserve Bank.

From the evidence offered by plaintiff in error it was shown

[illegible] for the plaintiff in error, in fixing the amount of plaintiff's damages in the sum of four thousand dollars. Plaintiff in error moves a motion at the close of all the evidence for a directed verdict in favor of plaintiff in error for the amount of the judgment. We conclude, in the sum of ten thousand seven hundred twenty two dollars and fifty cents, being the principal, interest and attorney's fees due plaintiff in error according to the said note on of the date of the entry of judgment by confession. A motion for a directed verdict was renewed by the trial court and error is assigned on the court's ruling. After motion for a new trial by plaintiff in error was made and overruled by the court a judgment was entered confirming the original judgment to the extent of four thousand dollars, (being the amount of the jury's verdict), as of October 24th, 1924, the date of the entry of the original judgment by confession.

Plaintiff in error contends that there is no competent evidence to the record tending to show that defendants in error are a legal [illegible] due to any portion of the indebtedness due on the note in question and that the trial court erred in not directing a verdict in favor of plaintiff in error under the full amount of the principal, interest and attorney's fees.

Defendants in error contend that the evidence shows that in [illegible] evidence of notes given by them to the Stock Exchange Bank [illegible] for the sum of $3,500.00 each were indicated in the transcript that they had voluntarily paid each of the $1,000.00 notes and therefore should be given credit on the note in question. If the [illegible] contended by defendants in error that in the [illegible] of the [illegible] notes they were accounted for $3,000.00 more than [illegible] note and that there is no consideration [illegible] the State Bank to [illegible] the [illegible] of the Stock Exchange Bank.

by the records of the State Bank that notes were given by the respective defendants in error to said State Bank as follows:- By both defendants in error on February 7, 1921, note for $900.00; by defendant in error, Robert Woolard, on same date for $1,400.00 and $3,750.00; by defendant in error, Mary Woolard, on January 14, 1921, for $200.00; by Robert Woolard on March 24, 1921, for $500.00; by Robert Woolard on June 7, 1921, for $300.00; by Robert Woolard on August 31, 1921, for $329.08; the total of these seven notes aggregating the sum of $7,379.08. On September 30, 1921, all of these notes were paid by a renewal note executed by Robert Woolard to the State Bank for the sum of $8,072.46, the difference between the amount of said seven notes and the renewal note of $8,072.46 being applied as a discount on the renewal note and the balance, amounting to $273.08, was deposited to Robert Woolard's account. On January 26, 1922, Robert Woolard renewed his previous note in the sum of $8,700.00 and the difference was deposited to Robert Woolard's account. This latter note was again renewed on March 28, 1922, for the same amount and on July 10, 1922, defendants in error paid to the State Bank $1,000.00 as principal and $498.50 as interest, and gave to the bank their renewal note for the balance in the sum of $7,700.00, which note was again paid by

By the records of the State Bank that notes were given by the respective institutions in error to such State Bank as follows:- By note information in error on February 7, 1921, note for $[illegible] by endorsement in error, Warren Poolman, in same note for $[illegible] and $[illegible] by endorsement in error, Mary Goodard, on January 14, 1921, for $[illegible]; by Robert [illegible] on [illegible] 24, 1921, for $800. By Robert Poolman on June 7, 1921, for $[illegible]; by Robert Poolman on August 31, 1921, for $[illegible]; the total of these seven notes aggregating the sum of $[illegible]. The disbursements, [illegible] and of [illegible] were paid by a general note executed by Robert Poolman to the State Bank for the sum of $[illegible]. The difference between the amount of [illegible] and the general note of $[illegible] originally applied as a discount on the general note and the balance, amounting to $[illegible], was decided to Robert Poolman's account. On January 20, 1921, Robert Poolman received the proceeds of the sum of $[illegible] and the difference was [illegible] Robert Poolman's account. [illegible] renewal of note on [illegible], for the same amount, on July 10, 1921, deducting in error the sum of the same $[illegible]. [illegible] and gave to the bank [illegible] note for the balance in the sum of $[illegible], which note was again [illegible]

renewal on January 17, 1923, by defendants in error executing a note for the same amount. On June 11, 1923, Robert Woolard gave to one George S. Clark his note for $125.00 which was by Clark endorsed to the State Bank. On July 3, 1923, defendant in error gave to the State Bank his note for $500.00 and on the same date executed another note to the State Bank for $700.00, these three notes, namely the $125.00 note, the $500.00 note and the $700.00 note, together with the $7,700.00 note were on September 26, 1923, paid by renewal by giving to the State Bank their note for $9,025.00.

The said note of $3,750.00 given by Robert Woolard to the State Bank on February 7, 1921, was given by him in the purchase of thirty shares of stock in the said State Bank and defendants in error do not question the original consideration for this note.

Robert Woolard some time after the purchase of this stock was made a director of the State Bank and continued as such until it was placed in liquidation and taken over by plaintiff in error in the early part of the year 1924.

The State Bank in November, 1923, became involved in financial difficulties, and through its Board of Directors, including the said Robert Woolard, entered into contract with plaintiff in error whereby plaintiff in error assumed the liabilities of the State Bank and provided for the liquidation of the State Bank.

renewed on January 17, 1922, by endorsement in error
executing a note for the same amount. On [illegible],
Robert Isolano gave to one Quirino S. Olivar his note for
$125.00 which was [illegible] to be paid back
on July 3, 1923, defendant in error gave to the State
Bank his note for $500.00 and on the same day delivered
another note to the State Bank for $100.00. These three
notes, namely the $125.00 note, the $500.00 note and the
$100.00 note, constituted the [illegible] on
September 26, 1921. Note by endorsed by Olivar
State Bank there was $4,000.00.

The said note of $4,000.00 given by Olivar
to the State Bank on January 7, 1922, was given by
in the purchase of stock [illegible] State
State Bank and [illegible] original consideration for this note.

Robert Isolano [illegible] the
above [illegible] of the [illegible]
such [illegible]
[illegible] in the [illegible]

The State Bank [illegible]
financial difficulties, and the [illegible]
taking the note Robert Isolano [illegible]
with plaintiff in error [illegible]
the liability of the [illegible]
liquidation of the State Bank.

The $9,025.00 note was at the time of the making of the contract for liquidation of the State Bank a part of the assets of the State Bank which had been rediscounted at the Federal Reserve Bank of St. Louis. Some time after the making of said contract the Federal Reserve Bank called on plaintiff in error to take up said $9,025.00 note, and it paid the Federal Reserve Bank the amount of the note and interest. Thereafter on January 30, 1924, defendants in error renewed said $9,025.00 note by giving to the State Bank their note for $9,000.00 (being the note in question) and an additional note for $236.80, which was used to pay the interest and $25.00 on the principal.

Defendants in error on the trial did not deny liability for the original note of $3,750.00 given for bank stock, nor did they deny owing the notes for the respective sums of $125.00, $500.00 and $700.00 given in the year 1923 to said State Bank, making a total of $5,075.00.

Robert Woolard, defendant in error, testified that $5,000.00 of the original $8,700.00 was included in that note in order to procure money to be loaned out by the State Bank, and on cross examination it appeared that this testimony was based on a conversation had with one Howard P. French, President of said State Bank, who had since died, and for that reason the evidence was stricken from the record on motion of plaintiff in error. Robert Woolard further testified, denying any knowledge of the

[illegible] $[illegible].00 note was at the time of the making of the [illegible] for liquidation of the State Bank [illegible] the assets of the State Bank which had been [illegible] to the Federal Reserve Bank of St. Louis. [illegible] time [illegible] the action of said contract the Federal Reserve Bank [illegible] as plaintiff in error to take up said [illegible] note, and it said the Federal Reserve Bank the [illegible] of the note and interest. Therefore on January [illegible], 1933, defendants in error tendered said $[illegible].00 note [illegible] to the State Bank their note for $[illegible] [illegible] the note in question) and an additional note for $[illegible], which was used to pay the interest and $[illegible].00 on the principal.

Defendants in error on the trial did not deny liability for the original note of $[illegible].00 given for bank stock, nor did they deny owing the notes for the respective sums of $125.00, $850.00 and $[illegible].00 given in the year 1922 to said State Bank, making a total of $[illegible].00.

Robert Woolard, defendant in error, testified that $[illegible].00 of the original $[illegible] loaned in that note in order to procure money to be loaned out by the State Bank, and on cross examination it appeared that such testimony was based on a conversation had with one Howard D. Vaughn, President of said State Bank, the day after date, and for that reason the evidence was held in the record on motion of plaintiff in error. Howard

notes that he had in the State Bank other than the $3,750.00 note at the time he executed the renewals of the notes given in 1922. The record shows that defendants in error paid interest from the time of the giving of their various renewal notes and that the aggregate amount of interest so paid by defendants in error on their indebtedness exceeded a thousand dollars.

The burden of proving a want of consideration for the note in question rested on the defendants in error. See Section 24 Negotiable Instrument Law, Chap. 98; Section 44 Cahill's Statute. Likewise the burden of proving payment rested upon the defendants in error. A consideration for a note may exist in many ways other than payment of money to the maker. When the evidence of Woolard, based upon his conversation with the deceased French (former President of the State Bank), was stricken from the record there remained no competent evidence tending to show that there was no consideration or a partial failure of consideration for the note in question.

As to defendants' in error contention that there had been a $5,000.00 payment on the indebtedness in question by reason of the alleged fact that two previous notes for $2,500.00 each had been included in the $8,700.00 note which was renewed on January 26, 1922, we fail to find in the record any competent evidence which bears out or tends to prove counsel's contention. It is clearly shown by the evidence in the record that these two $2,500.00 notes secured by a mortgage were executed by the defendants in error in the year 1919 to the State Bank and by them sold

notes that he had in the State Bank other than the [illegible]
note at the time he executed the [illegible] of the notes given
in 1922. The record shows that [illegible] interest from the time of the filing of their petitions
renewal notes and that the aggregate amount of interest so
paid by defendants in error on their indebtedness constituted
a thousand dollars.

The burden of proving a mistake of contract leading
for the note in question rested on the defendants in error.
See Section 24 Negotiable Instrument Law, Comp. St.
Section 44 Gamill's Statutes. [illegible] the matter of proving payment rested upon the defendants in error. [illegible] consideration for a note fully satisfied is merely a matter than
payment of money to the maker. The evidence of
Foster, based upon his conversation with the deceased
French (former President of the State Bank), was [illegible]
from the record there remained no other competent evidence tending to show that there was a mistake or a material
failure of consideration for the note in question.

As to defendants' in error contention that there
had been a $3,000.00 payment on the indebtedness in question
by reason of the alleged fact that two [illegible] notes for
$3,000.00 each had been included in the [illegible] note
which was removed on January 6, 1922, we find, after an
the record any competent evidence [illegible] to prove defendants' contention. It is certain from the
evidence in the record that there was no [illegible]
[illegible]

to two of their customers; that the defendants in error paid these notes by their check on July 11, 1922, and there was no testimony offered that these notes were in any manner involved with the note in question or in any of its previous renewals. The admission in evidence of these two $2,500.00 notes and mortgage securing the same, together with the check showing the payment thereof, without proof connecting them with the transaction in question, was erroneous and undoubtedly misled the jury in determining the issues between the parties.

There being no competent evidence in the record tending to prove that defendants in error have any legal defense to the note sued upon, it was the duty of the trial court to direct a verdict in favor of plaintiff in error according to its motion made at the close of all the evidence. Ferrero vs. Knights of Security, 309 Ill., 476.

For the reasons aforesaid the judgment of the Circuit Court is reversed with the finding of fact that defendants in error failed to prove any legal defense to the note counted on in plaintiff's in error declaration, and it is hereby ordered that said cause be remanded to the Circuit Court with directions to enter a judgment order confirming the original judgment by confession entered in said Circuit Court on October 20, 1924, in favor of Plaintiff in error and against said Defendants in error.

Reversed with finding of fact and direction to enter judgment order in Circuit Court.

Finding of fact and judgment order: We find that defendants in error failed to prove any legal defense to the note sued on in plaintiff's in error declaration, and it is ordered that said cause be remanded to the Circuit Court of Wabash County with directions to enter judgment order confirming the original judgment by confession entered in said Circuit Court of Wabash County on October 20, 1924 in favor of Plaintiff in Error and against said Defendant in Error.

Not to be reported

to two of their creditors; that the defendants in error paid these notes by their check on July 14, 1927, and there was no testimony offered that these notes were in any manner involved with the note in question or in any of its previous renewals.

The admission in evidence of these two $2,500.00 notes and mortgage securing the same, together with the check showing the payment thereof, without proof connecting them with the transaction in question, was erroneous and undoubtedly misled the jury in determining the issues between the parties.

There being no competent evidence in the record tending to prove that defendants in error have any legal defense to the note sued upon, it was the duty of the trial court to direct a verdict in favor of plaintiff in error according to its motion made at the close of all the evidence. Herrero vs. Knights of Security, 300 Ill., 476.

For the reasons aforesaid the judgment of the Circuit Court is reversed with the finding of fact that defendants in error failed to prove any legal defense to the note counted on in plaintiff's in error declaration, and it is hereby ordered that said cause be remanded to the Circuit Court with directions to enter a judgment order confirming the original judgment by confession entered in said Circuit Court on October 30, 1926, in favor of Plaintiff in error and against said Defendants in error.

Reversed with finding of fact and direction to enter judgment order in circuit court.

Finding of fact and judgment order: We find that defendants in error failed to prove any legal defense to the note sued on in plaintiff's in error declaration, and it is ordered that said cause be remanded to the Circuit Court of Madison County with directions to enter judgment order confirming the original judgment by confession entered in said Circuit Court of Madison County on October 30, 1926 in favor of Plaintiff in error and against said Defendant in error.